IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1297

DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL.,

Appellants,

v.

WILLIAM ROBERT ROBISON, ETC.

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE NATIONAL INTERRELIGIOUS SERVICE BOARD FOR CONSCIENTIOUS OBJECTORS AS AMICUS CURIAE

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INTEREST OF AMICI CURIAE

All parties have consented to the filing of this brief on behalf of the National Interreligious Service Board for Conscientious Objectors.[1]

[1]The consents of both parties have been filed, in accordance with Rule 42(2) of the Rules of this Court, with the Clerk of the Court.

The National Interreligious Service Board for Conscientious Objectors (NISBCO) is a tax-exempt charitable and educational organization which since its founding in 1940 has provided various counseling and informational services to registrants under the Selective Service System and to members of the nation's armed forces who seek assistance in applying for transfer to noncombatant service or discharges for reasons of conscience. The organization's Board of Directors includes representatives of the Mennonite Central Committee, American Baptist Church, Church of the Brethren, United Methodist Church, Christ's Catholic Conference, Lutheran Council in the USA, Church of the Brethen, United Methodist Church, Christ's Sanctified Holy Church, Friends United Meeting, United Presbyterian Church (USA) and Unitarian Universalist Association. Its Consultative Council represents almost fifty separate religious organizations. Furthermore, since its founding in 1940, NISBCO has been called upon by both the Selective Service System and the various armed services to comment upon various legislative and regulatory proposals and to suggest procedural and substantive changes in the statutes and regulations which, in NISBCO's judgment, would insure a more equitable administration of applications for conscientious objector status.

The National Interreligious Service Board for Conscientious Objectors has a direct and substantial interest in the outcome of this proceeding.* One of the stated aims of the organization is to provide "counsel and assistance to those seeking meaningful alternative service and to those [persons classified] I-W who seek equitable treatment." Another is to provide "professional counseling and up-to-date literature and memos on every facet of the conscientious objector's claim and appeal procedures." In pursuit of these aims, NISBCO has served as an educational

*Counsel wishes also to acknowledge the assistance of Duane Shank of NISBCO in the preparation of this brief.

resource advising the Congress and the military and draft authorities on the problems of conscientious objection. Representatives of NISBCO have testified on numerous occasions to the need for a fair and equitable administration of the system of alternate service. Moreover, as one of the largest and most experienced counselling organizations in this country, NISBCO has viewed at first-hand the disruption alternate service has caused in the lives of conscientious objectors and the hardship resulting from the failure to allow educational benefits at the conclusion of this service. In fact, in the period since the decision of the District Court in this proceeding, the organization has received numerous inquiries from conscientious objectors seeking information and assistance with respect to applications for such benefits and in the process chronicling the effect that preclusion of educational benefits was having on their lives.

In the view of the amicus, there is no basis, either in logic or in law, for denying conscientious objectors who have performed their obligations to serve their country in work of national importance, the right to receive educational benefits afforded as a matter of course to those who have served an identical period of time in active military service. Instead, NISBCO urges that this Court uphold the decision of the District Court and thus reaffirm that conscientious objectors perform important service in the national interest and are not to be treated as second-class citizens.

OPINION BELOW

The opinion of the District Court for the District of Massachusetts is reported at 352 F. Supp. 848.

STATUTES AND REGULATIONS INVOLVED

Section 1652(a)(i) of the Veterans' Readjustment Benefits Act of 1966, 38 U.S.C. §1652(a)(i) defines "eligible veteran" under the Act as:

"any veteran who . . . served on active duty for a period of more than 180 days any part of which occurred after January 31, 1955 and who was discharged or released therefrom under conditions other than dishonorable or . . . was discharged or released from active duty after such date for a service connected disability."

Section 1661(a) of the Act, 38 U.S.C. §1661(a), provides:

"Except as provided in subsection (c) and in the second sentence of this subsection, each eligible veteran shall be entitled to educational assistance under this chapter for a period of one and one-half months (or the equivalent thereof in part-time educational assistance) for each month or fraction thereof of his service on active duty after January 31, 1955. If an eligible veteran has served a period of 18 months or more on active duty after January 31, 1955, and has been released from such service under conditions that would satisfy his active duty obligations, he shall be entitled to educational assistance under this chapter for a period of 36 months (or the equivalent thereof in part-time educational assistance)."

Section 101 (21) of Title 38 defines the term "active duty" as including:

"(A) full-time duty in the Armed Forces, other than active duty for training;

"(B) full-time duty (other than for training purposes) as a commissioned officer of the Regular or Reserve Corps of the Public Health Service (i) on or after July 29, 1945, or (ii) before that date under circumstances affording entitlement to 'full military benefits' or (iii) at any time, for the purposes of chapter 13 of this title;

"(C) full-time duty as a commissioned officer of National Oceanic and Atmospheric Administration or its predecessor organization the Coast and Geodetic Survey (i) on or after July 29, 1945, or (ii) before that date (a) while on transfer to one of the Armed Forces, or (b) while, in time of war or national emergency declared by the President, assigned to duty on a project for one of the Armed Forces in an area determined by the Secretary of Defense to be of immediate military hazard, or (c) in the Phillippine Islands on December 7, 1941, and continuously in such islands thereafter, or (iii) at any time, for the purposes of chapter 13 of this title;

"(D) service as a cadet at the United States Military, Air Force, or Coast Guard Academy, or as a midshipman at the United States Naval Academy; and

"(E) authorized travel to or from such duty or service."

Section 211(a) of Title 38 provides, in pertinent part, that:

"the decisions of the Administrator on any question of law or fact under any law administered by the Veterans Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no . . . court of the United States shall have power or jurisdiction to review any such decision . . ."

QUESTIONS PRESENTED

1. Whether the educational assistance provisions of the Veterans' Readjustment Benefits Act, 38 U.S.C. §§1652(a)(i) and 1661(a), that provide financial assistance to veterans

who have served a requisite period of active duty but not to conscientious objectors who have completed a similar period of alternate service, are violative of the Due Process Clause of the Fifth Amendment?

2. Whether the statutory prohibition against judicial review of the decisions of the Administrator of the Veterans Administration, 38 U.S.C. §211(a), should bar review of the claim that the educational assistance provisions of the Act are unconstitutional?

STATEMENT OF THE CASE

This proceeding was instituted by William Robert Robison, a conscientious objector who satisfactorily performed two years of alternate service in the national interest at Peter Brent Brigham Hospital in Boston, Massachusetts. At the conclusion of his employment, Mr. Robison enrolled as a full-time student at Northwestern University Law School. Shortly thereafter, he was informed by the Veterans Administration in response to his request for assistance, that whatever his need he was not entitled to educational benefits under the Veterans' Readjustment Benefits Act of 1966.

Facing a possible financial crisis, Robison brought suit in the District Court for the District of Massachusetts on behalf of himself and all similarly-situated conscientious objectors. The complaint asked for a declaratory judgment that the provisions of the Veterans' Readjustment Benefits Act which barred conscientious objectors from seeking educational benefits were violative of the Due Process Clause of the Fifth Amendment and imposed a penalty in violation of the First Amendment right to free exercise of religion.[2] The Government moved to dismiss the complaint on three grounds: (1) because the court lacked jurisdiction under 38 U.S.C. §211(a) to review "the deci-

[2]The complaint is reproduced at Appendix, pages 5-9.

sions of the Administrator of any question of law or fact under any law administered by the Veterans Administration"; (2) because Robison had not exhausted his administrative remedy before the Board of Veterans' Appeals; and (3) because the statutory distinction between active military service and alternate service was not constitutional. The case was then heard upon the plaintiff's motion for summary judgment and defendants' motion to dismiss.

The District Court granted summary judgment in favor of Robison's position. The court rejected the contention that Section 211(a) barred review on the ground that:

> "Plaintiffs do not seek review of any such decision nor any affirmative relief . . .but rather a declaratory judgment that a 'law being administered by the Veterans Administration' violates the Constitution of the United States." 352 F. Supp. at 853.

The court dismissed in similar fashion the contention that the plaintiff had administrative remedies available since "the Board of Veterans' Appeals has gone on record as stating that it has no jurisdiction to decide the constitutionality of the educational benefits legislation (in) *Appeal of Peter W. Sly,* Board of Veterans' Appeals, 1972. Docket No. 72-07421." 352 F. Supp. at 853. The court then went on to discuss the merits of the constitutional issue.

In examining the challenged legislative classification, the court applied the traditional standard of reasonableness—i.e. whether the exclusion of conscientious objectors from educational benefits "bore a fair and substantial relation to the object of the legislation," *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920), rather than the stricter compelling interest test utilized by this Court with respect to suspect classifications or fundamental rights or liberties. The court cited the following four legislative purposes listed in the preamble to the Veterans' Act:

> "(1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those servicemen and women whose careers have been interrupted or impeded by reason of active duty . . . and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country." 38 U.S.C. §1651.

Noting that the first stated purpose was intended by Congress to be a subordinate one, 352 F. Supp. at 857, the court rejected the premise that this purpose was served by denying benefits to conscientious objectors in light of the procedural safeguards in the Selective Service laws against fraudulent conscientious objector claims and because of the small likelihood that there were a group of persons who were eligible for conscientious objector status, knew about the educational benefits provisions, and were willing to go into active service despite their well-founded conscientious objection to participation in the military simply because they sought educational benefits at the conclusion of their service. *Id.* at 857. The three remaining purposes, in the court's view, reflected Congress' desire simply "to eliminate the educational gaps between persons who served their country and those who did not," *Id.* at 858, and would not serve to uphold the classification between active duty and alternate service since "the disruption is equal as between the two groups." *Id.* In its discussion, the court rejected the claim that the potential hazards of certain forms of duty in the armed forces were relevant to the congressional objectives in passing the Veterans' Benefit Act.

Finding that Sections 1652(a)(i) and 1661(a) of the statute were thus unconstitutional in their application to conscientious objectors, the court ordered that Robison and the members of his class — conscientious objectors who had satisfactorily completed 180 days of alternate service or been granted early release therefrom on the basis of hardship or medical disability — be considered eligible to receive educational benefits "to the same degree and extent as veterans of military service" pursuant to 38 U.S.C. §101 (21) and §1652(a)(i). 352 F. Supp. at 862.

The District Court stayed its judgment pending this appeal and this Court granted the Government's request for review on May 14, 1973.

As amicus, we concentrate our discussion on one of the two issues raised on appeal: Whether the exclusion of conscientious objectors from eligibility for veterans' educational benefits violates the Due Process Clause of the Fifth Amendment. We agree with the District Court's summary rejection of the Appellants' contention that judicial review of this issue is foreclosed by 38 U.S.C. §211(a), and deal briefly with that issue in the final section of the brief.

SUMMARY OF ARGUMENT

The concept of conscientious objection to military service has been well recognized by the Federal Government at least since the Selective Service Act of 1940, and its roots go back further in American history. Under the basic system that has existed from 1951 to the present,[3] conscientious objectors are required, "in lieu of induction," to serve two years of alternate service in a job which, in the judgment of the officials of the Selective Service System, contributed to the "maintenance of the national health, safety, or interest." While there are differences in the precise nature of their respective service, conscientious

[3]Actual authority to induct registrants into the Armed Forces and alternate service expired on July 1, 1973.

objectors are processed in similar fashion and are subject to the same compelled disruption of their lives for two years that other draftees face who are inducted into active duty in the Armed Forces. In fact, the Selective Service regulations governing the assignment of conscientious objectors to alternate service have been and are still designed to insure that the effect on their lives will be similar to that experienced by men on active duty. See *Hackney v. Tarr*, 460 F. 2d 575 (4th Cir. 1972). And just as a military member is subject to punishment under Title 10 of the United States Code for failing to perform his assigned duties, so too is a conscientious objector subject to prosecution under federal law for failure to adequately perform his alternate service.

The Veterans' Readjustment Benefits Act of 1966, 38 U.S.C. §§1651-1697, (hereinafter sometimes referred to as "the Act" or "the 1966 Act") was the most recent in a series of statutes which granted to eligible veterans a wide range of benefits, among which were monthly payments for educational or vocational training at approved colleges, universities and similar institutions. The 1966 Act was the first to extend these benefits to veterans of the so-called "cold war" and subsequently its provisions became applicable to veterans who served during the years this country was engaged in the Vietnamese conflict.

Section 1652 (a)(i) of Title 38 provides that to be eligible for benefits under the 1966 Act, a person must have served on "active duty" for more than 180 days and have been other than dishonorably discharged. The definitional section of Title 38, Section 101 (21), which is applicable to all veterans' benefits legislation under that title, defines "active duty" by setting forth various forms of service, including full-time military service, duty as a Public Health Officer and study at an Armed Forces academy. Conscientious objectors who are called to and do perform alternate service, while not specifically excluded

from educational benefits in Section 101 (21) or any section of the 1966 Act, are rendered ineligible for such benefits by indirection — i.e. by the failure of §101 (21) to mention alternate service as a form of eligible service.

The amicus submits that the legislation granting educational assistance benefits to military veterans, public health officers and officials of the Federal Oceanographic Service but not to persons who have performed alternate service is an unconstitutional discrimination violative of the equal protection guaranteed all citizens through the Due Process Clause of the Fifth Amendment. See, *e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

The exclusion of a discrete class of individuals — those persons recognized by the Selective Service System as conscientious objectors — from benefits routinely awarded all others inducted through that system results in a suspect classification, which, under prior decisions of this Court, would require that the Appellants demonstrate a compelling federal interest in the classification. Clearly, there was no compelling interest in excluding conscientious objectors from entitlement to veterans' benefits. But even under the traditional rational relationship test, as was utilized by the District Court, the statutory exclusion bears no reasonable relationship to the purposes of Congress in formulating the Veterans' Readjustment Benefits Act of 1966.

The basic objective of the 1966 Act, as the District Court found, was "to compensate veterans for the deprivation of educational and economic opportunities that inhere" in national service, 352 F. Supp. at 858, or phrased in slightly different terms, to "attempt . . . to eliminate the educational gaps between persons who served their country and those who did not." *Id.* As we have stated and show in graphic detail below, the disruption suffered by veterans of alternate service is equal to, if not greater than, that suffered by veterans of military service for, besides

being called into service involuntarily, a conscientious objector does not enjoy certain re-employment rights automatically attaching to veterans of military service. Thus, the exclusion of conscientious objectors, even if scrutinized under the traditional rational relationship test, simply bears no relationship to the legislative purpose of compensating young men for their disruption in their lives caused by being subject to and inducted under the Selective Service laws. Moreover, while Congress appears to have had a second purpose in mind in enacting the 1966 Act, namely, "enhancing and making more attractive service in the Armed Forces . . . ," 38 U.S.C. §1651, the exclusion of conscientious objectors fares no better as a possible basis for validating the statute. For as suggested by the court below, the assumptions that the exclusion of conscientious objectors will somehow prevent less than honest claims to such status by persons who were now reluctant to do so because of the absence of benefits or lead persons of strong beliefs who are eligible to qualify as objectors to enter into active military duty in order to receive educational benefits are far too "speculative and do not support the required inference that a rational connection exists between the exclusion and the goal." 352 F. Supp. at 857-858. In our judgment, these assumptions border on the frivolous.[3a]

Section 211(a) of Title 38 is not a bar to judicial review of the issue of the constitutionality of the 1966 Act as applied to conscientious objectors. That section seeks to prevent decisions of the Administrator of the Veterans Administration "of any question of law or fact *under any law* administered by the Veterans Administration providing benefits for veterans" (Emphasis added). This may be a

[3a] The suggestion that the exclusion is designed to save the Government from larger expenditures, first raised in this Court, is, we think, similarly without merit. Compare *Jefferson v. Hackney*, 406 U.S. 535(1972).

proper means of effectuating a legislative concern lest the courts be clogged with essentially factual disputes over the extent of benefits to be awarded in each individual case, disputes which Congress as a matter of policy concluded might better be left to the informed discretion of the Administrator and his delegatees. But the Appellee did not come into the District Court seeking review of a decision of this type; rather he sought, on behalf of himself and his similarly-situated class, resolution of a legal question arising under the Federal Constitution, a question which the Board of Veterans' Appeals had expressly refused to consider on the ground that it had no jurisdiction to do so. In the *Appeal of Peter W. Sly*, Board of Veterans' Appeals Docket No. 72-07421 (1972). Given the wording of the statute referring to questions "under any law" administered by the Appellant, its evident purposes and the ordinary presumption in favor of judicial review of constitutional questions regarding the powers of an administrative agency, we think it clear that the court below correctly ruled that the cause was not barred by §211(a).

ARGUMENT

I

CONGRESS HAS MANDATED THAT CONSCIENTIOUS OBJECTORS SERVE THEIR COUNTRY IN A MANNER WHICH DISRUPTS THEIR LIVES FOR THE SAME PERIOD THAT A NON-CONSCIENTIOUS OBJECTOR MUST SERVE IN MILITARY DUTIES

A. The Background of Alternate Service

Under each Selective Service Act enacted by Congress since 1940 and the regulations promulgated thereunder, every male citizen upon registering for the draft at age 18 has been placed within the lowest classification and then reclassified by his local draft board according to his changing status until such point as he became eligible for

induction into military service or was rendered by age or disability permanently ineligible for such service. This procedure, and the order of call thereunder, has been equally applicable to those persons who were determined by their local draft boards "by reason of religious, ethical, or moral belief, to be conscientiously opposed to participation in both combatant and noncombatant training and service in the Armed Forces," 32 C.F.R. §1622.14 (1971); *see 50 U.S.C. App.* §456(j). Upon becoming eligible for induction, these persons have been required "in lieu of such induction" and "subject to such regulations as the President . . . prescribe(d)," 50 U.S.C. App. §456(j), to perform approved civilian alternate service "contributing to the national health, safety or interest," *id.*, for a two year period. Thus, a conscientious objector could properly be ordered to report for alternate service only if the order were issued at a time when he would have been ordered by his local board to report for military service had he not been classified as a conscientious objector. See *Gardiner v. Tarr*, 341 F. Supp. 423 (D.D.C. 1972); see also 32 C.F.R. §1660.4(a) (1972; *United States v. Dudley*, 451 F. 2d 1300 (6th Cir. 1971). And any conscientious objector knowingly violating such an order was prosecuted in the same manner as a person refusing to submit to induction into the Armed Forces. 50 U.S.C. App. §456(j).

This system of civilian alternate service represented a legislative judgment that the right to conscientious objection from military service did not release a young man of his obligation to serve his country for a period of two years.[4] It was made in light of a long tradition of conscientious objection, espoused often in the face of great difficulties, throughout American history.

In the American colonies many members of various peace

[4]By contrast, in Great Britain conscientious objectors were exempted from all forms of national service during World War II.

churches felt compelled to refuse service in the local militia and some even refused payment of so-called "Indian war taxes", even in the face of threats of punishment for such actions. Several states responded by recognizing in general terms the right of conscientious objection from participation in warfare. Selective Service System, Special Monograph No. 11, *Conscientious Objection* (1951), at 30. Pennsylvania went so far as to enact a comprehensive "alternate service" provision, providing that:

> "All Quakers, Mennonists, Moravians, and others conscientiously scrupulous of bearing arms, who shall appear on any alarm with the militia, though without arms, and obey the commands of the officers in extinguishing fires, suppressing insurrection of Slaves or other evil-minded persons during an attack, in caring for wounded, conveying intelligence as expresses or messengers, carrying refreshments to such as are on duty, and in conveying to places of safety women and children, aged, infirm, and wounded persons, are free and exempt from the penalties of the Act." *Id.*

The Continental Congress similarly assumed the right to conscientious objection:

> "As there are some people who from religious principles cannot bear arms in any case, this Congress intend no violence to their consciencies, but earnestly recommend it to them to contribute liberally, in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed country, which they can consistently with their religious principles." *Id.* at 33.

Following the Revolutionary War, several states and James Madison proposed that the Constitution contain a specific guarantee of the right to exemption from military service of persons "religiously scrupulous of bearing

arms," 1 *Annals of Congress*, 1st Cong. (1789), at 433; the proposal was not adopted, however, apparently because of the number of states that had already spoken on the subject.

By the commencement of the Civil War, many of the states had enacted legislation for the recognition of conscientious objectors. Accordingly, the Adjutant General issued a General Order implementing the Federal Militia Act of 1862 and removing from the draft rolls the names of "all persons exempted by the laws of the respective states from military duty." Special Monograph No. 11, *supra*, at 40. And both the Federal Draft Law of 1864 and its counterpart passed by the Confederacy allowed any person to be excused from military service upon payment of a "bounty" fee. *Id.* at 42-48. But many conscientious objectors resided in states that did not exempt them from other than carrying arms, and thus were torn between paying a bounty fee or being sent to military prisons.

During the First World War, the Selective Service Regulations provided a basic form of noncombatant service for conscientious objectors. Selective Service Regulations, §79, Rule XIV (1917). In practice, however, these persons were inducted into the Armed Forces and then assigned to noncombatant duty such as the Medical or Quartermaster Corps. This created serious difficulties for those persons who were conscientiously opposed to wearing a uniform or directly contributing toward the mission of the Armed Forces. The treatment of these persons was quite severe. See generally Hartzler, *Mennonites in the World War*. (Mennonite Publishing House, 1922); Peterson & Fite; *Opponents of War 1917-18* (University of Michigan Press, 1957); Schlissel, *Conscience in America* (Dutton, 1968).

In Section 5(g) of the Selective Training and Service Act of 1940, the Congress for the first time made provision for both conscientious objectors who would accept noncombatant duty within the Armed Forces and those who

could not serve in the Armed Forces. This section stated in pertinent part:

> "Nothing contained in this Act shall be construed to require any person to be subject to combatant training and service in the land or naval forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Any such person claiming such exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, . . . , in lieu of such induction, be assigned to work of national importance under civilian direction."

Section 5(g) remained unchanged during the six years the Act was utilized, and under it developed a program known as "Civilian Public Service" (CPS). Almost 12,000 conscientious objectors performed their "work of national importance" at little or no pay in 151 CPS camps across the country, with any earnings theoretically designed to be placed into a special fund held by the Treasury Department and earmarked for various relief work after the war. Gingrich, *Service for Peace* (Mennonite Central Committee, 1949).[5] This sytem of compulsory alternate service was upheld by the federal courts on the express ground that a soldier was "deprived of similar rights by being required to offer his life on the field of battle". *Roodenko v. United States*, 147 F. 2d 752, *cert. denied*, 324 U.S. 860 (1944). Subsequently, in 1951 the Civilian Public Service program became what we now term the "alternate service" program. Selective Service Act of 1951, §1(g).

This brief history demonstrates that there has been in this country a constant regard for the beliefs of those

[5]The fund, amounting to $1.4 million, was frozen by the Treasury and merged into the Department's general receipts in the late 1950's.

citizens who felt conscientiously opposed to military service, and a concomitant recognition that the conscientious objector should be required to perform some form of service in return for his being exempted from active military duties. In light of this understanding, the fact that the Congress in the 1940 Act recognized the right to be exempt from either combatant or from both combatant and noncombatant duties, but called for persons in the latter category to perform "work of national importance," must be viewed as a congressional judgment that all conscientious objectors would be required to serve the country in a manner closely akin to the military service required of the ordinary draftee.

B. The Statutory and Regulatory Framework

In accordance with the requirement of service and the analogy to other draftees, the Selective Service statute and regulations have continued to set forth stringent requirements for the selection and supervision of alternate service. Under the statute the registrant's work must be "contributing to the national health, safety or interest." 50 U.S.C. App. §456(j) Under the most current regulatory language, the work must not be in the competitive job market, the compensation must relate to the pay received by Armed Forces personnel and the registrant must work outside of his community. See 32 C.F.R. §1660.6(a). There are no geographic limitations on the last criterion; in fact, the previous regulation, in effect when the appellee was called to alternate service, expressly sanctioned "assignment and abrupt reassignment in any part of the United States, or overseas, including war zones." 32 C.F.R. §1660.31(b) (1971). And finally, the local boards have been instructed through the years to strictly employ these standards. For example, Local Board Memorandum No. 98, "Determination of Work for I-W Service," issued on September 11,1969, stated:

"The Presidential Regulations define appropriate civilian work as being limited to employment by the Government, or by certain non-profit organizations, but this does not require the local board to approve every job that may fall within these broad guidelines. There are many jobs that would fall within the definition prescribed in these regulations that would never be deemed appropriate as an alternative civilian service by a local board . . .

"*The local board, in carrying out its responsibility . . . must . . . see that the path of the conscientious objector . . . processed for . . . civilian work parallels as nearly as possible to the path of the I-A man in his processing for performance of military duty. Under this theory, the conscientious objector's pay should be reasonably comparable to the pay, allowances and other benefits received by the man inducted into the Armed Forces; and his assignment should be beyond commuting distance from his home.* The registrant does not have the right to select the work which he is to perform unless the job selected is deemed by the local board to be appropriate for the individual registrant, even though the work selected by the registrant may fall within the definition appearing in the regulations. Local boards consider work assignment on an individual case basis . . . an assignment to a particular job for one registrant does not bind his local board or other local boards to approve a similar job for another registrant."
(Empahsis added).

In sum, it is fair to say that through the years the Selective Service System has strictly enforced standards for

alternate service work for conscientious objectors.[6] The purpose of these standards is self-evident; they were designed, as was the entire alternate service program, to recognize the right to conscientious objection while "alleviat(ing) the unfairness which results if conscientious objectors continue to enjoy the fruits of civilian life while their fellow citizens are conscripted." *United States v. Boardman*, 419 F. 2d 110, 112 (1st Cir. 1969). See also *Howze v. United States*, 272 F. 2d 146 (9th Cir. 1959). How well Congress has succeeded in preventing conscientious objectors from enjoying the "fruits of civilian life" is evidenced by the nature of alternate service. Conscientious objectors have served, and continue to serve, in peaceful missions throughout the world, performing service "in the national health, safety and interest". Some have served in combat zones or as fire fighters and a few of these have given their lives to their country. Even those working in hospitals have everyday risked the contraction of disease. Every veteran of alternate service has performed his tasks at compensation at or below military standards, some at the lowest level of subsistence. And out of that pay, the conscientious objector, unlike his military counterpart, must provide food, clothing and shelter.

The parallelism between the conscientious objector and the ordinary draftee does not terminate with a disruptive assignment to alternate service as approved by the federal government, at a comparatively low level of compensation.

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[6]At one time the National Director of the System followed a policy of rejecting assignments otherwise in the national interest on the sole ground that the work did not disrupt in sufficient fashion the conscientious objector's life. This policy was discussed and found invalid in *Hackney v. Tarr*, 460 F. 2d 575 (4th Cir. 1972). See also former Local Board Memorandum No. 64 (1969).

For a thorough analysis of these standards, see Silard, *Invalid Disruption Rules for CO Alternative Service*, 3 Col. Survey of Human Rights Law 136 (1970).

For not only is the conscientious objector subject to prosecution under the Selective Service statute for failure to report for employment, but the regulations provide that any violation of the reasonable order of a civilian employer may be considered a violation of the same statute. 32 C.F.R. §1660.8. The conscientious objector thus is in a position logically not unlike the position of a member of the Armed Forces subject to prosecution under the Uniform Code of Military Justice, 10 U.S.C. §801 et seq., for failure to perform his assigned duties. In fact, the draft law imposes heavier penalties.

In sum, we think that the District Court correctly found "that the statutory and regulatory scheme governing the performance of alternate service results in a disruption in the lives of alternate service performers which . . . is ordinarily as great as that to which active duty veterans have been subjected." 352 F. Supp. at 858.[7] We turn now to a brief examination of the practical effect of the disruption in the lives of conscientious objectors.

C. The Practical Effects of Disruption for Alternate Service

As we have noted in our Statement of Interest, the National Interreligious Service Board for Conscientious Objectors has viewed on a first-hand basis the disruption caused by the dislocating effects of alternate service in the lives of conscientious objectors. The Board has had similar occasion to observe the attendant hardships resulting from the failure to provide educational and vocational benefits for performers of alternate service.

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[7]See also the unpublished opinion of Judge Kronenberg in *Zannie v. Liberty National Bank & Trust Co.*, No. D-78774 (N.Y.S. Ct. Dec. 4, 1972), 6 *Selective Service Law Reporter* 3080, in which the court found conscientious objectors entitled to the same deferment of repayment of student loans available to military veterans.

Those registrants who serve as conscientious objectors in alternate service are, like their counterparts inducted into the armed services, young men from all walks of life who in the main could not be said to have moved very far in the direction of their ultimate educational and occupational goals.[8] Whatever progress they have made in this direction, they are abruptly removed from the civilian educational path and/or job market for a period of two years to perform national service which is totally unrelated to their future endeavors. To be sure, this is often the same situation faced by a registrant called to active military duty. But the military offers a myriad of special educational and training programs designed to *enhance* the careers of its members and makes other efforts to utilize their skills and training. In contrast, over one-half of the alternate service performers are assigned to menial tasks in hospitals and nursing homes, although few, if any, can relate such duties to their future careers. *NISBCO Reporter for Conscience' Sake* (November, 1970) at 3. Furthermore, even if he has not taken advantage of in-service educational or vocational training, the returning military veteran enjoys an important advantage vis-a-vis his conscientious objector contemporary which is unrelated to the exclusion of benefits at issue in this proceeding. That is the re-employment right guaranteed under 50 U.S.C. App. §459(b)-(g). By this statute, veterans of military service are guaranteed restoration to their civilian employment at the same rate of compensation and without having suffered any loss in seniority. See generally *Fishgold v. Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 284 (1946). Veterans of alternate service are not included within the coverage of this statute, and thus may well return to civilian life bereft of the means to support themselves or their families.

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[8] A 1970 NISBCO survey showed that 96 per cent of those persons serving alternate service had received a high school diploma. *NISBCO Reporter for Conscience' Sake* (November, 1970) at 3.

NISBCO has received literally hundreds of communications seeking information or assistance with regard to the possibility of receiving veterans' benefits for alternate service. These communications invariably detail the particular hardships facing the conscientious objector. We think it worthwhile to summarize a few of these letters, all of which are on file at NISBCO headquarters.

"I hold a janitorial position at (a California hospital) and I've held this position for a little over 4 months now. Prior to working as a janitor I was employed as a probation officer with the hope that it would be an acceptable job toward fulfilling my 24 months of obligatory service as a C.O. The job as a probation officer was not deemed acceptable employment by my draft board and after I received my second notification from them that it was not acceptable, I left the probation dept. and took the first job that came up which was a job as a janitor."

"My job is beyond the shadow of a doubt the worst I have ever had and consists of shoveling chicken manure. (Plus the part-time feeding and watering of the 3,000 deficating creatures.) I am a philosophy collegiate senior with very little saved to continue my education later."

"I feel that the I-W program could be and is (in some cases) a very useful, beneficial thing. However, I have found it to be otherwise for both myself and 'the national interest' I've supposedly been working for. I am a degreed mechanical engineer. I fail to see that digging ditches or cleaning a shop is the best possible use of my background and education. Out of the seven months I've been at my present job, I received $50 per month less than the salary schedule showed for my job classification. Some

time ago the personnel man assured me that 'I was lucky to have the job' I had—digging ditches, etc. In summary, I feel that the work I was doing *before* all this came along was more in the national interest than this punishment presently being received."

"The only jobs that I was offered were not jobs that contribute to public health, or welfare, but jobs that my local board insisted were created to place conscientious objectors in boring and unnecessary work. I recognize my duty to serve my country, but the compensation is so low that there is not enough for one person to live on, let alone a husband and a pregnant wife."

"I want to work with children and I told the board this but they were insistent on make-work in a hospital. I think if we must 'disrupt' our lives for two years, we should get more than a job that won't support you and have the system smile and tell you they are doing you a big favor by letting you be a CO."

This, then, is the human side of the exclusion from veterans' benefits; severe hardship and deprivation occuring as the direct result of a young man following his conscience and at the same time performing important national service.

II

THE VETERANS' READJUSTMENT BENEFITS ACT WAS DESIGNED TO COMPENSATE PERSONS SERVING THEIR COUNTRY FOR THE DISRUPTION IN THEIR LIVES CAUSED BY TWO YEARS OF COMPULSORY SERVICE

A. The Structure of the Act

Through the years, the Congress has attempted in various ways to recognize service to the country by forms of veterans' benefits legislation. The Act which is at issue here, the Veterans' Readjustment Benefits Act of 1966, 38 U.S.C. §§1651-1697, basically represents an attempt to recognize the importance of national service during the so-called "Cold War" period. See 1966 *U.S. Code Cong. Rec. & Admin. News* 1888-90. Among the important benefits it includes for eligible veterans are payments for educational and vocational training based on the period of service performed.

Section 1652(a)(i) of the Act, 38 U.S.C. §1652(a)(i), defines an eligible veteran as a person who served on "active duty" for a period of at least 180 days subsequent to January 31, 1955 and was discharged under honorable conditions. "Active duty" is defined under 38 U.S.C. §101 (21), which applies to all veterans' benefits legislation in Title 38, and includes full-time duty in the Armed Forces and certain other types of service, including the Public Health Service, Oceanographic Survey and study at an Armed Forces academy. No mention is made of alternate service here or in any other section of the statute, and it is this omission upon which the Government has based its refusal to allow veterans of alternate service to receive educational benefits. See Exhibits A & B to Plaintiff's Complaint.

B. The General Legislative Purposes

The legislative history of Section 101 (21) and the 1966 Veterans' Benefits Act fails to reveal any clues as to the

basis for excluding alternate service from the reach of the Act. It may well be that in drafting these provisions Congress simply was not mindful of the concept of alternate service and the relatively few persons who were called upon to perform such service.[9] This possibility becomes more acute when one considers that the statutory definition includes such obviously non-military duties as the Public Health Service and National Oceanic and Atmospheric Administration.

Congress itself set forth in the preamble to the 1966 Act four reasons for the legislation:

> "The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of: (1) enhancing and making more attractive service in the Armed Forces of the United States; (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education; (3) providing vocational readjustment and restoring lost educational opportunities to those servicemen and women whose careers have been interrupted or impeded by reason of active duty . . . , and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country." (38 U.S.C. §1651).

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[9]The National Advisory Committee on Selective Service noted that "conscientious objectors represent one of the smallest groups in the Selective Service System". *National Advisory Commission Report* (1967) at 48. In 1967, for example, the year the National Advisory Commission issued its report, 6,367 young men were performing alternate service, while 298,559 men were inducted into active military service. *Semi-Annual Report of the Director of Selective Service* (Dec. 31, 1972) at 56.

Leaving the first goal, which was not intended as a primary purpose, 352 F. Supp. at 863, n. 10, for later discussion, the remaining three purposes relate to the same theme—that a young man called upon to serve his country suffers a disruption in his life and particularly his educational and vocational goals. This theme is echoed in the Report of the Senate Committee on Labor and Public Welfare on the bill that contained substantially the language that appeared in the final version:

> ". . . Absent the exigencies of the cold war, the majority of these young people would not enter military service—normally they would remain in civilian life, pursuing their own individual goals."
>
> ". . . today's servicemen drop further and further behind their civilian contemporaries who generally pursue educational objectives, or enjoy the higher wage scales and other economic advantages of civilian life. In sum, then, irrespective of how a young man enters military service, harmful consequences will follow from the fact that a substantial portion of his life, which would ordinarily be devoted to civilian goals, is consumed in the performance of active military service." S. Rpt. No. 269, 89th Cong., 1st Sess., at 6, 10.

While stating that these benefits should be available "irrespective of how a young man enters military service", the Senate Committee made specific reference to the compulsory Selective Service System, which required only certain men to serve:

> "The Committee further finds that this obligation [for the government to provide benefits] and the need for this legislation are based upon the continued existence of the compulsory draft law, which calls only a select group of men away from their private lives to perform military service on behalf of the entire Nation." *Id.* at 7.

The hardship and disruption suffered by a veteran was also recognized in the House of Representatives. Representative Halpern, testifying before the House Committee on Veterans' Affairs, noted:

> "While their contemporaries are advancing their careers, establishing homes and pursuing their educations, our men in uniform are foregoing opportunites for personal advancement . . . Upon the termination of their service, they find themselves at a comparative disadvantage . . ." House of Representatives, Hearings before the Committee on Veterans' Affairs, 89th Cong., 1st Sess., at 3139)

The House Committee's Report pointed out that with increasingly higher levels of training necessary to a successful career, the opportunities lost as a result of the two years spent in service constituted a potential permanent liability in the lives of these young men. Furthermore, it emphasized "that the purpose of the Committee is not to equalize educational opportunities for the veteran population, but rather to provide assistance which would help a veteran to follow the educational plan that he might have adopted had he never entered the Armed Forces." H. Rpt. No. 1258, 89th Cong., 2nd Sess., at 5.

In fact, this emphasis on disruption and regaining lost time differentiates the 1966 Act, and the predecessor Serviceman's Readjustment Assistance Act of 1944 and Veterans' Readjustment Act of 1952, from pre-World War II veterans' legislation. In these later statutes, Congress simply was recognizing that all veterans, regardless of their type of service, "encounter special problems in re-entering civilian life because of the interruption of their normal lives". S. Rpt. No. 269, at 25.

C. The 1966 Act was not Intended to Encourage Enlistments or to Reward Only Hazardous Military Duties

In the Act's preamble, as we noted above, the Congress mentioned the secondary purpose of "enhancing and making more attractive service in the Armed Forces." As the court below found, however, the exclusion of conscientious objectors from benefits could not fairly be said to relate to this legislative purpose. In their jurisdictional statement, the appellants apparently intended on appeal to this Court to raise two additional and related purposes for this legislation, namely, "encouraging enlistments and rewarding service to one's country which involves the physical hazards inherent in active military service." In their brief on the merits, the appellants have converted these alleged purposes into a congressional judgment that only the military veteran has been subjected to "the potential for hazardous military duty." Brief for Appellants, at 20. Such a *post hoc* attempt to support the Act falls of its own weight. First, the very language of the Act makes no distinction between either the basis for entry into service (i.e. voluntary enlistment and compulsory induction) or between hazardous service and civilian-type duties such as in the Public Health Service, often in Washington, D.C., in an oceanographic research laboratory, or in a special services military unit for entertainers, athletes, etc. And, the Act was applied retroactively to members who volunteered or were drafted between 1955 and its effective date. Second, as we show below, the Department of Defense recognized in 1966, and has continued to hold to the belief, that the Act has an effect exactly opposite to the encouraging of enlistments. Finally, as we note later, in 1966 the Congress expressly rejected the idea of relating veterans' benefits to hazardous duties in the military as a type of bonus for such service or, in appellants' words, for "the potential for hazardous military duties".

When legislation extending benefits to cold-war veterans was proposed in 1966, the General Counsel for the Department

of Defense registered his strong objection that such legislation would *deter* enlistments:

> "Programs of education and vocational assistance encourage personnel to leave military service immediately after accruing the maximum benefits which can be gained. This results in a serious handicap to the Armed Forces in their efforts to attract and retain qualified personnel on a career basis." S. Rpt. No. 269, *supra*, at 24.

In hearings before the House Committee on Veterans' Affairs, the Deputy Assistant Secretary of Defense for Manpower similarly noted that:

> "The Department of Defense does not favor legislation which provides the serviceman with an inducement to leave the military service after accruing entitlement to educational benefits under such legislation." House Committee hearings, *supra*, at 2959.

The fact that this argument proved unavailing before Congress in 1966 has not caused the Department to alter its view that educational benefits lessen the ability of the services to enlist and retain qualified personnel. During the 1971 hearings on military compensation, for example, Defense Secretary Laird stated:

> "The GI Bill . . . does in certain respects have an adverse impact upon our retention of young men and women in the military services.
>
> "As a member of Congress, I helped sponsor the GI Bill and other improvement legislation along that line, but the impact on retention as far as the GI Bill is quite the reverse of what you might think. We encourage our young men and women if they are leaving the service, use the GI Bill and go forward and take part in those educational and other benefits, but sometimes the benefits are

> so attractive that they are more interested in going outside the service and receiving these benefits than they are in staying in the service." Hearings on Selective Service and Military Compensation, Senate Committee on Armed Services, 92nd Cong., 1st Sess., at 35.

In a more recent and stronger statement the Assistant Secretary of Defense for Manpower and Reserve Affairs recommended the abolition of veterans' benefits, on the grounds that "It's an entitlement that's absolutely worthless as an incentive," and that instead of keeping people in the service, "it drives them out." Army Times, v. 33, no. 52 (August 1, 1973) at 5. Thus, not only is it inaccurate to suggest that Congress intended the Veterans' Readjustment Benefits Act to encourage enlistments in the Armed Forces, but in practice, as suggested by the Department of Defense itself, the Act has exactly the reverse effect.

The contention that the 1966 Act, and therefore the exclusion of alternate service veterans, might be said to reward only service involving physical hazards simply flies in the face of the history of the Act. The Veterans Administrator stated in a letter to the Senate Committee in 1966 that:

> "The Veterans Administration has opposed bills providing peacetime veterans readjustment benefits (such as education and training) on the ground that this type of benefit should be limited to situations where wartime service sharply disrupted career planning . . ." S. Rpt. No. 269, at 21.

This was not the only testimony suggesting that eligibility for benefits under the Act be limited to persons serving in hostile areas. Several Senators, however, made it clear during the hearings on the 1966 Act that they did not desire the Act to serve as a reward for hazardous duties. Senator Mondale, for example, pointed out that:

> "The previous GI Bills were not designed to reward veterans for the battle risks they ran, but were designed to assist them in readjusting to civilian life and in catching up to those whose lives were not disrupted by military service. And that is what this cold war GI Bill is intended to do." Hearings, Senate Subcommittee on Veterans' Affairs, 89th Cong., 1st Sess., at 152.

Senator Yarborough added:

> "We have pointed out over and over what you have in the closing two paragraphs of your statement—that this is not a bonus bill . . . this is a readjustment bill . . ." *Id.* at 153.[10]

The Senate Committee brushed aside the objection of the Administration, and a minority of its members, noting in its Report that:

> "The proposal . . . to limit eligibility under this bill to those veterans who have served in 'areas of hostilities' as designated by the President was rejected for several reasons. In the first place, the *philosophy and purpose of the GI Bills is and has been to give readjustment assistance to the veteran returning to civilian life after substantial military service and not to reward him for the risk that he*

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[10]Senator Yarborough reiterated in testimony before the House Committee on Veterans' Affairs his view that the legislation was not designed as a bonus for hazardous service:

> "I do not wish this bill to be confused with the thoughts of those who would hold this educational opportunities out as a reward to those who undergo specially hazardous duty for their country. I mention this because I do not believe that there is any room in our American philosophy for the demand that our youth earn educational opportunities by risking their lives." Hearings, House Committee on Veterans' Affairs at 2897.

might have been exposed to." S. Rpt. No. 269, at 19 (Emphasis added).

It is evident from what we have shown that the 1966 Veterans' Readjustment Benefits Act was: (1) not designed to encourage military enlistments, and in fact discourages the retention of personnel in the Armed Forces; and (2) that Congress did not intend that the Act reward hazardous duty. To paraphrase Senator Yarborough, see n. 10, *supra*, the Congress found it inconsistent with our country's basic philosophy to "demand that our youth earn educational opportunities by risking their lives."

III

THE EXCLUSION OF CONSCIENTIOUS OBJECTORS FROM BENEFITS UNDER THE VETERANS' READJUSTMENT BENEFITS ACT BEARS NO REASONABLE RELATIONSHIP TO THE PURPOSES OF THE ACT AND THEREFORE REPRESENTS AN UNCONSTITUTIONAL CLASSIFICATION

A. The Constitutional Test

Although the Equal Protection Clause of the Fourteenth Amendment is expressly applicable only to powers exercised by the states, this Court has in a series of rulings held that the right to equal protection under laws enacted by the federal government is basic to our constitutional system and is guaranteed through the Due Process Clause of the Fifth Amendment. *E.g., Shapiro v. Thompson*, 394 U.S. 618 (1969); *Schneider v. Rush*, 377 U.S. 163 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954). As is the case with state legislation under the Fourteenth Amendment, the federal statute must be tested under one of two standards. Under the tradtional test, the classification will be found to deprive an individual or group of the equal protection of the laws if it bears no substantial relationship to the objectives of the legislation. See *San Antonio Independent School District v. Rodriguez*, 411 U.S. 17 (1973); *McGowan v. Maryland*, 366 U.S. 420 (1961). This

Court has applied a more exacting standard to legislation which involves either a so-called "inherently suspect" classification of a "fundamental" right or liberty protected by the Constitution. Such legislation will be upheld only upon a showing that the government had a compelling interest in its enactment. See *Graham v. Richardson,* 403 U.S. 365 (1970).

The Court below adopted the former test in finding the legislation at issue here to be constitutionally defective. But the court added:

> "In spite of these factors that militate against application of the compelling interest analysis, the court does consider that the undeniable effect of this legislation is to deny important benefits to a discrete minority. The nexus of these two factors may justify a form of heightened, if not strict, scrutiny into the legislation." 352 F. Supp. at 856.

We submit that it would not be inappropriate for this Court to apply the compelling interest standard in this case and affirm the decision below on the ground that there was and could not have been a compelling interest of the federal government in excluding veterans of alternate service from educational benefits. For whether or not the right to an education is to be considered a fundamental right, a question which the Court seems to have answered in the negative in *San Antonio Ind. School District v. Rodriguez,* 411 U.S. 1 (1973), the Act sets up a suspect classification—a relatively small group of young men who are prevented by their religious beliefs from participating in military service and who are compelled to serve a comparable period of time in alternate service. The test for application of the compelling interest standard is couched in the alternative; either the right affected is a fundamental right or the classification is "suspect" and "therefore subject to strict judicial scrutiny whether or not a fundamental right is impaired,' *Graham v. Richardson, supra,* 403 U.S.

at 376; see also *San Antonio Ind. School District v. Rodriguez*. Excluding conscientious objectors clearly results in a discrete and inherently suspect classification. Compare *San Antonio Ind. School District*, where this Court found that the alleged discrimination involved a "large, diverse and amorphous class" which did not result in a suspect classification. 411 U.S. at 20.

We do not dwell upon the reasons for applying the compelling interest standard in affirming the decision of the District Court. For we think it clear in any event that the classification does not pass constitutional muster under the traditional reasonable relationship standard.

B. The Classification Measured Against the Legislative Purposes

We have noted earlier the purposes of the 1966 Act as set forth by Congress in its preamble. To restate them briefly, the purposes were two-fold: first, and primarily, to compensate all returning veterans for the disruption in their schooling and employment opportunities caused by two years of compulsory service to the country; and second, to enhance and make more attractive service in the Armed Forces. Neither purpose is served by the exclusion by omission of veterans of alternate service.

Examining the primary purpose of the Act, the District Court concluded that "[a]lthough military veterans and alternate service performers lead different lives, their service lives have shared one common denominator: the inability to pursue the educational and economic objectives that persons not subject to the draft law could pursue." 352 F. Supp. at 859. If anything, this conclusion may be an understatement; for, as we have noted before, the returning veteran of alternate service is guaranteed no re-employment rights and his counterpart in military service may have taken advantage of certain opportunities unique to the Armed

Forces.[11] In order for legislative classifications to be upheld under the Constitution, "the criterion for differing treatment must bear some relevance to the object of the legislation." *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Morey v. Doud*, 354 U.S. 457, 465 (1957). Since the distinctions between military and alternate service do not relate to the disruption in the lives of the young men called upon to perform such services, the challenged exclusion cannot possibly be said to "bear a rational relationship to (the) state objective." *Reed v. Reed*, 404 U.S. 71,76 (1971). For the Congress simply was "attempting to eliminate the educational gaps between persons who served their country and those who did not." 352 F. Supp. at 858. To eliminate the gaps for all but those relatively few young men who were ordered to perform work recognized by Congress as "contributing to the national health, safety, or interest" must be viewed as a capricious, or perhaps unintentional, action. If intentional, the exclusion was predicated on "criteria wholly unrelated to the objectives of the statute," *Reed v. Reed, supra*, 404 U.S. at 76.[12]

The other basic purpose stated in the Act's preamble—i.e. enhancing the attractiveness of military service—bears no greater relationship to the challenged classification, and cannot be said to support the exclusion of conscientious objectors from the Act's coverage. Here, we find accurate and well-put the statement of the District Court in rejecting

[11]There are other benefits conferred on military members and denied to their alternate service counterparts. These include in-service family allowances and travel discounts, and post-service life insurance, and mortgage assistance.

[12]In an analogous context, the District Court for the District of Columbia refused to validate a section of the Dependents' Medicare Act which precluded illegitimate dependents from the Act's coverage despite the Government's contentions that the exclusion maintained high morale and limited the payment of benefits to persons with a true service connection. *Miller v. Laird*, 349 F. Supp. 1034 (D.D.C. 1972).

the premise that the exclusion rationally relates to the government's interest in making military service more attractive:

> "A contrary conclusion would seem to rest on one or two tenuous assumptions. First, it would assume that if the statute were changed to afford benefits to persons who have performed alternate service, then many persons who would go into military service, under the statute as now written, would choose alternate service because they would get the educational benefits . . . [T]he court finds persons performing military duty . . . [T]he court very much doubts that many persons would make the attempt . . .
>
> "Another assumption . . . would be that some persons who are conscientious objectors in fact are willing to join the military so that they can persons performing military duty . . . [T]he court that this assumption—that the challenged exclusion will attract into active duty persons who are in fact conscientious objectors—is highly speculative and does not support the required inference that a rational connection exists between the exclusion and the goal of 'enhancing and making more attractive service in the Armed Forces of the United States'." 352 F. Supp. at 856-57.

The *amicus* emphatically concurs with the judgment of the District Court that the exclusion of benefits neither keeps young citizens not entitled to recognition as conscientious objectors from attempting falsely to claim such status nor attracts into active duty persons who are legitimate conscientious objectors.

In sum, the exclusion of persons who have performed alternate service from benefits under the Veterans' Readjustment Benefits Act of 1966 bears no "fair and substantial relation [to]," *Royster Guano v. Virginia*, 253 U.S. 412,

415 (1920), the purposes of compensating returning veterans for the disruption of their lives or of making service in the Armed Forces more attractive. All that the statutory exclusion accomplishes, either by design or oversight, is to deny a group of young men who have ably served their country the same opportunity to resume their civilian goals that is granted to every other veteran of compulsory service.[13]

IV

SECTION 211(a) OF TITLE 38 DID NOT BAR THE DISTRICT COURT FROM REVIEWING THE CONSTITUTIONALITY OF THE STATUTORY EXCLUSION FROM VETERANS' BENEFITS

The Appellants press on this appeal the argument raised unsuccessfully to the district court that Section 211(a) of Title 38 is a bar to federal court review of the constitutional attack on the 1966 Act as applied to conscientious objectors. The district court summarily rejected this contention, based on the very language of Section 211(a) which restricts review only of a decision of

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[13]If this Court should disagree with the equal protection arguments advanced here and by the District Court, we submit that the District Court's ruling may be affirmed on another ground advanced by the Appellees, namely, the fact that the failure to grant benefits to alternate service veterans imposes a burden on the free exercise of religion by conscientious objectors. We leave to the pleadings of the counsel for the Appellees a fuller discussion of this issue. We do note in passing the rulings of this Court in *Braunfeld v. Brown*, 366 U.S. 599 (1961), and *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Braunfeld*, the Court noted that the government could impose an indirect burden, even if unintentional, on the free exercise of religion only if it could not "accomplish its purpose by means which do not impose such a burden." 366 U.S. at 607; cf. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). In the Verner case, the Court made it clear that benefits may not be conditioned on the recipient's willingness to violate a tenet of religious faith.

the Veterans Administrator arising under a statute providing for veterans' benefits. The court's ruling on this point is consistent with what we view as the evident purpose of Section 211(a), namely, to prevent discretionary decisions of the Administrator or his delegatees with respect to matters well within their expertise and not determined in an arbitrary fashion, (such as the extent of disability in a particular case), from burdening the federal courts.[14] To suggest that the legislation goes further and is, or even could be, designed to preclude judicial review of an issue arising under the Constitution—i.e. the congressional power to discriminate among young men—would raise grave questions of constitutional balance. Moreover, it would leave a class of citizens—individuals who have served their country honorably for at least two years—from ever being in a position to question the constitutionality of the actions of the administrative agency which very directly affects their personal lives. For the Veterans Administration has no authority itself to determine the constitutionality of its powers. *Appeal of Peter W. Sly,* Board of Veterans' Appeals, *supra;* see also *McKart v. United States,* 395 U.S. 185 (1969); *Leedom v. Kyne,* 358 U.S. 184 (1959).

In addition to the language and evident purpose of Section 211(a), we think that the district court's view of that section is supported by analogy in several opinions of this Court with regard to the bar on judicial review of the operations of the Selective Service System.[15] The language of that bar states:

> "No judicial review shall be made of the classification or processing of any registrant by local

[14]See generally *Hester v. Melidosian,* 261 F. Supp. 659 (M.D. Pa. 1966).

[15]See also *Reynolds v. United States,* 292 U.S. 443 (1934); *Ng Fung Ho v. White,* 259 U.S. 276 (1921).

> boards, appeal boards, or the President except as a defense to a criminal prosecution instituted under Section 12 of this title after the registrant has responded, either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form . . ." 50 U.S.C. App. 460(b)(3).

The literal scope of Section 10(b)(3) was limited by this Court in *Clark v. Gabriel*, 393 U.S. 256 (1968), to situations where the local draft board "has exercised its statutory discretion to pass on a particular request for classification," and thus the board action "inescapably involved a determination of the fact and an exercise of judgment." 393 U.S. at 258. In the companion case of *Oestereich v. Local Board No. 11*, 393 U.S. 233 (1968), this Court noted that review was not precluded when "there (was) no exercise of discretion by a board in evaluating evidence and in determining whether a claimed exemption is observed." 393 U.S. at 238. Mr. Justice Harlan, concurring, noted: "I do not understand that phrase ('classification or processing') to prohibit review of a claim . . . that the very statutes or regulations which the board administers are facially invalid." He went on to conclude that because draft boards "are not expressly delegated any authority to pass on the validity of regulations or statutes," "to withhold pre-induction review in this case would . . . deprive petitioner of his liberty without the prior opportunity to present to *any* competent forum—agency or court—his substantial claim that he was ordered inducted pursuant to an unlawful procedure." *Id.* at 243. See also *Breen v. Local Board No. 16*, 393 U.S. 460 (1970), where this Court upheld review of a claim that the local board had acted pursuant to a command of the National Director at variance with the statute and the valid regulations promulgated thereunder, and *Fein v. Local Board No. 7*, 405 U.S. 365 (1972), where Justice Blackmun reaffirmed

that Section 10(b)(3) applied only "where the board, authoritatively, has used its discretion and judgment in determining facts and in arriving at a classification for the registrant." 405 U.S. at 369.

Thus, in an analogous area—the processing of registrants under the Selective Service System—this Court has refused to construe a statutory ban on judicial review of agency action as being all-inclusive and has instead looked to the purpose served by the bar in light of the administrative framework under which the agency operates. We submit that the same result should obtain with respect to the meaning of Section 211(a), at least insofar as its applicability to constitutional issues raised by the various veterans' benefits statutes.

CONCLUSION

For the foregoing reasons, the judgment of the District Court for the District of Massachusetts should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1297

DONALD E. JOHNSON,
ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL.,
APPELLANTS,

v.

WILLIAM ROBERT ROBISON,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

Questions Presented

1. Does the Veterans Readjustment Benefits Act of 1966 violate the First Amendment guarantee of religious freedom and the Fifth Amendment guarantees of equal protection and due process of law by excluding, from its program of providing educational assistance in compensation for lost opportunities and time, conscientious objectors who have been drafted to perform alternative service?

2. Is 28 U.S.C. § 211(a) intended to oust all federal courts, including this Court, from jurisdiction to review the constitutionality of certain provisions of the Veterans Readjustment Benefits Act, and, if so, is § 211(a) unconstitutional?

Statutes Involved

The statutory provisions set forth by the Government should be supplemented as follows:

> 38 U.S.C. § 1651. Purpose
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> The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country.

Statement

1. The Nature of Alternative Service

This is an action brought on behalf of the class of conscientious objectors who were drafted to perform at least

two years of civilian alternative service and who have satisfactorily completed such service.

Selective Service registrants who establish that they possess sincere scruples against participating in war and in non-combatant service receive a I-O classification from their local boards.[1] This classification, like the I-A and I-A-O classifications, renders the registrant immediately liable to be drafted in the normal order of call.[2]

Upon being drafted, I-O conscientious objectors are ordered, in lieu of induction, to report for "civilian work contributing to the maintenance of the national health, safety, or interest" (hereinafter "alternative service"). 50 U.S.C. App. § 456(j). The duration of alternative service is equivalent to the duration of military service, two years unless extended by law. *Ibid.*[3]

Since its inception in World War II, it has been express government policy that alternative service assignments disrupt the civilian lives of I-O conscientious objectors on a scale comparable to the disruption experienced by registrants who perform military service. The essence of this policy was summarized in a Selective Service memorandum made public in 1943:

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[1] See 32 C.F.R. § 1622.14. Registrants whose beliefs permit them to perform non-combatant service are classified I-A-O. See 32 C.F.R. § 1622.11.

[2] See 32 C.F.R. § 1660.4(a). Because of the institution of an all-volunteer Army, most registrants are no longer subject to the draft. See 50 U.S.C. App. § 476(c).

[3] In World War II, I-O conscientious objectors served for the duration of the War and incurred a 10-year reserve commitment. *Conscientious Objection*, Special Monograph No. 11, pp. 96-97 (Selective Service System 1950).

Overseas alternative service assignments in the United Methodist Service Program are three years in duration. See *Guide to Alternative Service*, 83 (Published by National Interreligious Service Board for Conscientious Objectors, 1970).

> From the time an assignee reports to camp until he is finally released he is under control of the Director of Selective Service. He ceases to be a free agent and is accountable for all of his time, in camp and out, 24 hours a day. His movements, actions and conduct are subject to control and regulation. He ceases to have certain rights and is granted privileges instead. These privileges can be restricted or withdrawn without his approval or consent as punishment, during emergencies or as a matter of policy. He can be told when and how to work, what to wear and where to sleep. He can be required to submit to medical examinations and treatment and to practice rules of health and sanitation. He may be moved from place to place and from job to job, even to foreign countries, for the convenience of the government regardless of his personal feelings or desires.[4]

During the period pertinent to this case, the policy was set forth in internal Selective Service directives. These directives require local boards to ensure that the "path of the conscientious objector in being processed for and performing civilian work parallels as nearly as possible the path of the I-A man."[5] The boards are further instructed to make certain that alternative service assignments "constitute a disruption of the [I-O] registrant's normal way of life somewhat comparable to the disruption of a registrant who is inducted into the Armed Forces."[6]

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[4] Reprinted in Report by the American Civil Liberties Union, *Conscience and the War*, 22-23 (1943).

[5] Local Board Memorandum No. 98, issued September 11, 1969, rescinded February 8, 1972, 4 S.S.L.R. 2200.7.

[6] Local Board Memorandum No. 64, issued March 1, 1962, rescinded February 8, 1972, 4 S.S.L.R. 2183.

This policy is implemented by detailed regulations limiting the pay for alternative service work to the pay the conscientious objector would have received had he entered the Armed Forces, prohibiting assignments to jobs in the competitive labor market, and requiring the conscientious objector to perform service in a location beyond commuting distance from his residence.[7] Moreover, registrants drafted for alternative service may be ordered to perform assignments in any location within the United States or overseas, including war zones.[8] Willful failure to report for or to satisfy the reasonable requirements of the alternative service assignment constitutes a felony punishable by up to five years imprisonment or a $10,000 fine.[9]

This action challenges the constitutionality of the Veterans Readjustment Benefits Act of 1966 (hereinafter "the Act"). Under this Act, all draftees who serve on active duty in the Armed Forces for 180 days are eligible to receive educational assistance. Those draftees eligible include the class of I-A-O conscientious objectors who perform non-combatant service. I-O conscientious objectors are excluded from the Act's education program because "active duty," as defined by 38 U.S.C. §§ 101(21) and 1652(a)(3) does not include the performance of alternative service. Appellee charges that this exclusion violates the First and Fifth Amendments to the Constitution.

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[7] See the current Selective Service regulation, 32 C.F.R. 1660.6 which compiles criteria for alternative service assignments previously set forth in L.B.M.'s and preceding Selective Service regulations.

[8] See 32 C.F.R. § 1660.6(5). A listing of alternative service assignments is provided in *Guide to Alternative Service, supra.*

[9] 50 U.S.C. App. § 462; 32 C.F.R. § 1660.8.

2. The District Court's Opinion

The District Court sustained the Fifth Amendment claim under the "traditional" equal protection standard. Based on a consideration of each of Congress' stated purposes for providing educational assistance, the court concluded that the challenged exclusion bears no reasonable relation to any of these purposes. (20a).[10]

While agreeing with the Government that one purpose of educational assistance is to stimulate enlistment by making military service more attractive, the court found that this purpose was not rationally furthered in the case of men who enter the service only because they are or definitely will be drafted. For these men, the vast majority of those who have served in the Armed Forces during the period pertinent to this case, there was and could be no incentive; they were determined not to serve unless compelled to do so.

The Government's case here, in substantial part rests on the contention that the district court misapplied the rational basis test by confining its inquiry to whether providing alternative servicemen with educational assistance would "disserve" the statutory goal of encouraging enlistments. (Gov. Br. pp. 16-17). But the Government's argument is based on a critical omission of fact, namely that its sole position below on the enlistment purpose was that it was affirmatively served by the challenged exclusion. The exclusion was, according to the Government, a means of deterring fraudulent applications for conscientious objector status, and of enlisting registrants who could qualify as conscientious objectors, but who would presumably forsake their religious scruples for educational assistance under the Act. The district court properly tested these affirmative

[10] "(a)" references are to the district court's opinion, reprinted in Appendix A to the Jurisdictional Statement (J.S.).

reasons for the exclusion, but found them wholly wanting in rationality. (15a-17a). On appeal the Government makes no claim that the challenged exclusion affirmatively serves any purpose.

The court viewed the second purpose of the Act's educational program as a conglomerate of the latter three purposes specified in 38 U.S.C. § 1651, "basically variations on a single theme": to compensate veterans for the interruption or disruption of their educational and economic opportunities that results from being drafted and serving two years in the Armed Forces, while those who avoid the draft pursue their civilian goals at full pace. (17a). The court found that the disruption suffered by conscientious objectors performing alternative service is factually indistinguishable in its causes and severity from the educational disruption for which the Act provides compensation. As the court concluded:

> "[T]he disruption is equal as between the two groups. Like military veterans, alternate servicemen have been exposed to the uncertainties caused by the draft law. They too were burdened at one time by an unsatisfied military obligation that adversely affected their employment potential; were forced, because of the draft law, to forego immediately entering into vocational training or higher education; and were deprived, during the time they performed alternate service, of the opportunity to obtain educational objectives or pursue more rewarding civilian goals." (19a).

The Government argue below that educational assistance is a reward or bonus for the hazards or potential hazards of military service. But the court rejected this contention as being without support, citing the provisions of the Act under which every member of the Armed Forces is declared

eligible for benefits regardless of the location or condition of service so long as he has served for at least 180 days and the legislative history expressly rejecting the reward purpose. (18a). On appeal, the Government appears to have abandoned the reward argument.

The district court also rejected the Government's claim that whatever the constitutional deficiencies in the Act, 38 U.S.C. § 211(a) deprives the federal courts, including this Court, of all jurisdiction over the subject-matter. The court determined that Congress had no such intention. By its terms, § 211(a) is inapplicable, the court held, because the Administrator has neither "decided" the constitutional questions presented by this case, nor are these questions of law determinable "under any law administered by the Veterans' Administration . . ." (7a-8a).[11]

Summary of Argument

I.

The conscription laws in our history have made various accommodations for I-O conscientious objectors. These accommodations reflect Congress' respect for the religious beliefs involved, as well as for the tested willingness of these men to suffer extreme penalties rather than relinquish their principles. At the same time, Congress has commanded that these men fully bear their responsibilities as citizens. Thus they are subject to the draft and must serve their country for two or more years.

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[11] A question was also raised below by the Government as to whether appellee had exhausted administrative remedies since his application for educational assistance had not been considered by the Board of Veterans Appeals. The district court concluded that exhaustion was not required in view of the fact that the Board had already declared itself without jurisdiction to determine the constitutionality of the Act. (8a).

However, in time of war or crisis I-O conscientious objectors are the focus of intense public resentment. They have been branded as slackers and traitors. This public hatred has been shared in some quarters of Congress and has pressured the Congress generally to impose harsh and punitive conditions on I-O conscientious objectors during these periods. Since World War II, one such condition has been that the objector receives no compensation for his service-connected disabilities and no allowances for his dependents, despite the fact that his disabilities and his dependents' needs are as real as those of his counterparts in the military. The challenged classification that denies educational assistance only to I-O conscientious objectors for the educational and career disabilities that result from their service is a product of the punitive non-compensation policy and should be assessed in light of its evident purposes and onerous effects.

II.

The challenged exclusion is void under the "traditional" equal protection test because it bears no rational relation to the Act's purposes, which are explicitly set forth in the Act itself.

The first purpose of the Act, making military service more attractive to stimulate enlistments, does not relate to draftees, since they cannot be enticed to enlist. It cannot be assmued that Congress provides educational assistance to draftees for the unreal purpose of encouraging either draftees or potential enlistees to volunteer. In short, the class of draftees who perform military service (including I-A-O conscientious objectors) and the class of draftees who perform alternative service are similarly situated in terms of the enlistment purpose of the Act.

Likewise, they are similarly situated in terms of the major purpose of the Act which is to compensate the educational and career disabilities that result from service. The Government acknowledges that I-O conscientious objectors suffer educational disruption to the same extent as military personnel, but argues that military service has some amorphous "special impact" that makes it more difficult for military personnel to readjust to civilian life. But, meeting this broader readjustment need, which the Government concedes has no relation to educational disruption, is not the objective of the Act. Essentially the Government is arguing that educational assistance is a bonus for the dislocations caused by military service. This purpose is patently at odds with the terms and history of the Act. And, even assuming the existence of a "special impact," it is clear that thousands if not millions of eligible veterans experienced no such "special impact." The Government's argument that their inclusion under the Act and the I-O conscientious objectors' exclusion can be justified on a theory that Congress is not required to draw mathematically nice lines, is wholly unsupportable.

III.

Indeed, the challenged exclusion serves no legitimate purpose. The only purpose it serves is the purpose served by the non-compensation policy generally, and that is to punish I-O conscientious objectors for their beliefs.

IV.

A fortiori the challenged exclusion cannot survive the demands of the strict judicial scrutiny test. That level of scrutiny is required because the challenged exclusion both "affects" the free exercise of religion and embodies a

suspect classification. Moreover, even under the "spectrum of standards" approach strict scrutiny is required. The challenged classification serves no compelling interest of any kind, and the Government makes no claim that it does.

V.

Wholly apart from the equal protection guarantee, the challenged exclusion effects a burden on the free exercise of religion by I-O conscientious objectors in violation of the First Amendment. That I-O conscientious objectors have borne this penalty on their religious beliefs rather than relinquish their religious principles in no way diminishes their entitlement constitutional protection under the Free Exercise Clause. The applicability of the Free Exercise Clause is not conditioned on the pusillanimity of the individual.

VI.

The preclusive scope of 38 U.S.C. § 211(a), as the express language of the provision makes clear, is limited solely to "the decision of the Administrator on any question of law or fact under any law administered by the Veterans' Administration . . ." This case involves a claim of right under the Constitution, not "under any law administered" by the Veterans' Administration. Nor does this action in any respect contest the Administrator's "decision . . . on any question of law or fact," since the constitutional questions raised here could not have been and were not decided by the Administrator. In fact, as the court below notes, the Administrator has repeatedly disavowed the power to decide the constitutional questions presented by this case.

Argument

Introduction

Though they constitute a minute fraction of the total number of Selective Service registrants and draftees, I-O conscientious objectors have historically been the focus of intense public hostility, particularly in periods of mobilization for war.[12] For it is in these periods that the nation has been forced to resort to conscription of its citizens, overriding their personal liberties and interrupting their civilian pursuits.

Each conscription law enacted by Congress has made some provision for the conscientious objector, although not always for the objector to non-combatant service.[13] These accommodations reflect Congressional respect for the religious freedom involved. *Gillette* v. *United States*, 401 U.S. 437, 445. But, conscientious objectors have not been exempted from the draft and serving their country. Congress, both out of manpower needs and in the interest of fairness, has directed that conscientious objectors be con-

[12] Approximately 10 million men were inducted for military service between 1955 and the termination of the draft in 1972. Neither the Selective Service nor the Department of Defense maintains data on the actual number of those who perform alternative service. But it is estimated, on the basis of information provided by the Selective Service and by the National Interreligious Service Board for Conscientious Objectors (NISBCO), the organization established in World War II to administer Civilian Public Service Camps, that since 1955 about 50,000 conscientious objectors have performed alternative service.

[13] The history of the conscientious objection exemption from colonial times to the present Selective Service Act is traced in *United States* v. *Seeger*, 380 U.S. 163, 170. See also Brief for Respondent in *United States* v. *Seeger, supra;* Russell, *Development of Conscientious Objection Recognition in the United States*, 20 G. W. L. Rev. 409 (1952); *Conscientious Objection*, Special Monograph No. 11, Selective Service System (1950).

scripted like other registrants and be compelled to perform service in the national defense consistent with their religious beliefs.[14]

It is, however, a distinct pattern in our history, that in the periods of war or crisis, I-0 conscientious objectors have been the subject of extreme public outrage.[15] During such times these men have been singled out in private and through public policy for punitive treatment.

Sheer brutality marked the World War I treatment of conscientious objectors. See Schlissel, *supra* at 19, 130-131; Kellogg, *The Conscientious Objector*, 83-85 (1919) (Euphemizing physical beatings as "good-natured hazing"); Thomas, *The Conscientious Objector in America*, 128-164 (1923).

And since World War II, I-0 conscientious objectors have been compelled to perform years of alternative service without compensation for the disabilities and disruption that this service has caused. The pain of brutal treatment passes, but the denial of compensation has a lasting, debilitating impact not only on the conscientious objector, but on his family as well. See Schlissel, *supra* at 20, 215-216; Cornell, *The Conscientious Objector and the Law*, 108

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[14] See *Conscientious Objection*, Special Monograph No. 11, p. 1, (Selective Service System 1950).

[15] See Schlissel, *Conscience in America: A Documentary History of Conscientious Objection in America*, 1757-1967 (1968); Kellogg, *The Conscientious Objector*, 1 (1919) ("He [the conscientious objector] has been eulogized by well-meaning persons, who understand neither the conscientious objector himself nor the national interest in a time of war, and he has, on the other hand, been roundly abused and reviled by a large part of our citizenry as a coward and a slacker. Apparently, there is no compromise ground: he is diabolically black to his critics while to his defenders his raiment is as the snows."); Peterson and Fite, *Opponents of War*, 121 (1957); Cornell, *Conscience and the State*, (1944); Sibley and Jacob, *Conscription of Conscience*, 110 (1952).

(1943); *Conscientious Objection*, Special Monograph No. 11, *supra* at p. 339. Although he performs compulsory service in the national defense in fulfillment of his obligation as a citizen, the I-O conscientious objector has consistently been denied compensation provided to military personnel for like service and service-connected disabilities.

The non-compensation policy was implemented to the hilt in World War II. Despite the fact that they served in camps doing hazardous work for the duration of the war, I-O conscientious objectors received no compensation of any kind.

> "The conscientious objector was compelled to labor in Civilian Public Service without remuneration. His dependents had to fend for themselves without government aid or benefits of any kind. He was left financially unprotected in case of injury or death during his service, except where he was assigned to work covered by state workmen's compensation laws. These three severe financial penalties were deliberately inflicted on men who allowed their consciences to direct them into civilian rather than military service." Sibley and Jacob, *Conscription of Conscience*, 216-217 (1952).

In testimony before the Senate Military Affairs Committee in 1943, General Hershey, Director of the Selective Service, explained the Government's reasons for requiring I-O conscientious objectors not only to work without wages, but to pay for their own upkeep.

> Senator Gurney: He [alternate serviceman] does not get paid now?
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> Gen. Hershey: None.
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> The Government furnishes the housing and bedding [in the Camps] but the feeding, clothing, and so forth,

come from religious organizations that put up the money.

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Senator Wallgren: You are treating these fellows worse than the Japs.

Gen. Hershey: Maybe so, but we have, in your state, groups in two of your hospitals for the insane and there they get $2.50 per month for personal use.

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Senator Wallgren: Do you feel that they should be paid?

Gen. Hershey: Definitely not.

It would destroy the best public relations. The thing we have to consider is they have not received any pay so far, and I think I would be supported by 60 to 70 per cent of the people, who consider that this is one of the contributions they are making to show that they are really conscientious objectors and conscientiously believe what they came to believe, and I know some that will not accept, under any circumstances, Government money. I do not believe any of the Mennonite Church members, by and large, would accept any money.[16]

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[16] See *Hearings before the Senate Committee on Military Affairs*, 78th Cong., 1st Sess., 20-24 (February 17, 1943). Alternative servicemen in World War II were required to pay $35 a month for their support. If they or their families were unable to pay this amount, the objector's church was obligated to pay it. If neither the conscientious objector nor his church was able to afford the support charge, the National Service Board for Religious Objectors provided the money. Schlissel, *supra* at 225-226.

Congress several times authorized the Selective Service to pay and provide allowances to alternative servicemen "at rates not in excess of those paid to persons inducted into the Army . . . ." see *e.g.* Public Law 630 of June 27, 1942, but, no appropriation

Bills to extend coverage of the Federal Employees' Compensation Act to I-O conscientious objectors for service-connected death or disability were introduced in Congress

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of funds for this purpose was requested by the Selective Service or made by Congress. See also Cornell, *The Conscientious Objector and the Law*, 109-111 (1943).

This non-compensation policy for I-O conscientious objectors contrast with the treatment of I-A-O conscientious objectors:

> Senator Johnson: The non-combatant men are paid?
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> Colonel Kosch: The noncombatant men are paid the same as any other soldier. The noncombatant soldier in the army is assigned to the Medical Department, certain sections of the Quartermaster Corps, the Engineering Corps, Chemical Warfare, and Signal Corps, in certain types of work that do not require a man to be armed, and they receive the same pay and compensation as any other soldier.
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> Senator Johnson: But he does not have to bear arms?
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> Colonel Kosch: He does not have to bear arms in those sections or be trained in the use of them.
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> Senator Johnson: The Seventh Day Adventists, you have those?
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> Colonel Kosch: Practically all of those go into the noncombatant service of the army; very few of those go in the conscientious-objector camps.
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> Senator Bridges: What do you include in noncombatant service?
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> Colonel Kosch: There are certain parts of the Medical Corps, medical units, base hospitals, and so forth, in the rear that are not assigned actually to combatant service; certain sections of the Quartermaster Corps having to do with the rear area; engineering and construction work, and things like that, in the rear area not actually with combat troops; the Signal Corps, the handling of and the construction of communication lines, and so forth, where it is not actually in the combat area; and also service with the Chemical Warfare, the handling of transportation of chemicals and things, where it is not actually in the area of combat, quoted in National Service Board for Conscientious Objection, *Congress Looks at the Conscientious Objector*, 41 (1943).

Hearings before Senate Military Affairs Committee on August 19, 1942, 77th Cong., 2nd Sess.

in 1942 and 1943. See S.2708, 77th Cong., 2nd Sess.; S.675, 78th Cong., 1st Sess.[17] The hazards of alternative service were becoming evident from the substantial numbers of service-connected disabilities incurred; indeed, the overall disability rate for the war was equivalent for alternative and military servicemen. Sibley and Jacob, *supra* at 222, n. 39. There was complete awareness in Congress, however, of the public bitterness and antipathy towards I-O conscientious objectors, and every effort was made to rationalize this legislation as protection for the United States against future tort claims and to disclaim any intention to benefit the individuals involved.[18] Nevertheless, none of the proposals was enacted. See Sibley and Jacob, *supra* at 222-224; National Service Board for Religious Objectors, *Congress Looks at the Conscientious Objector,* 50-64 (1943).

Another severe application of the non-compensation policy involved Congress' refusal to appropriate funds for needy dependents of alternative servicemen.

> The refusal of Congress to make any provision for assistance to dependents of drafted c.o.'s exposed the wives, children, and aged parents of men in C.P.S. to extreme hardship and insecurity, and put the men themselves under severe psychological strain as they helplessly watched their families struggle to survive without adequate income. A more callous method of disabling conscience could hardly have been devised,

[17] Each year, the bills were reported favorably by the Senate Committee on Military Affairs. S.Rep. No. 1583, 77th Cong., 2nd Sess., August 24; 1942, S.Rep. No. 73, 78th Cong., 1st Sess., March 1, 1943.

[18] Hearings before the Senate Military Affairs Committee, 77th Cong., 2nd Sess., August 8, 1943; see also 88th Cong. Rec. 6981 (August 27, 1942); 89th Cong. Rec. 2846-2847 (April 2, 1943).

for in effect it made a c.o.'s dependents victims of his integrity. The conscientious objector faced the wracking choice of surrendering his ideals by entering the armed forces or sacrificing the security of his dependents, when they might not even share his convictions. Sibley and Jacob, *supra* at 220.

The House debate on this point is illuminating:

> Mr. Thomas: Does the gentleman see any good reason why we should give any consideration to conscientious objectors anyway?
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> Mr. Sparkman: This bill does not purport to give consideration to conscientious objectors, but to the wives and children of conscientious objectors who are left in a needy condition, many of whom may not even agree with the views of the conscientious objectors.
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> Mr. Sparkman: I should like to call the gentlemen's attention to the fact that this does not appropriate any money out of the Treasury, but that this is money which has been earned by the conscientious objectors themselves.
>
> Mr. Thomas: Nevertheless, conscientious objectors should not be given any consideration. That is the way I feel.
>
> Mr. Sparkman: This money has been placed in a special deposit in the Treasury of the United States under an agreement that it is not to be spent for war purposes.
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> Mr. Sparkman: Mr. Speaker, I regret that objection has been made. I believe that one familiar with the

facts would agree to the objective sought by this measure.

This bill is an attempt to correct a situation among conscientious objectors who have been drafted. I realize these men constitute an unpopular minority, but I sincerely hope we will not allow the general disfavor with which this group is regarded to blind us to inequities in our treatment of them.

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The particular discrepancy at which this bill is directed, however, is the fact that conscientious objectors do not receive any dependency benefits, despite the fact that they have exactly the same percentage of wives and children as men sent to the military service —about 35 per cent. This means, in effect, that we are penalizing wives and children because we do not agree with their husbands and fathers. Let us apply the restrictions directly to the men, if we will, but we should not extend the punishment to their families. 90th Cong. Rec. pp. 5329-5330 (June 5, 1944).[19]

The non-compensation policy has been relaxed since World War II, to the extent that alternative servicemen now re-

[19] The operative principle in dealing with I-O conscientious objectors was best capsulated by General Hershey: "the conscientious objector, by my theory, is best handled if no one hears of him." *Hearings before the Senate Committee on Military Affairs*, 78th Cong., 1st Sess., 23 (Feb. 17, 1943).

Compensation was not the only area where this principle was applied. At the end of the war the Selective Service proposed to discharge I-O conscientious objectors on the same basis as men in the military. "The public and the Congress misunderstood this suggested separation procedure, however, and thought of it as unduly favoring the conscientious objector." *The Operation of Selective Service*, Special Monograph No. 17, p. 132 (Selective Service System 1955). The proposal was abandoned and time in service replaced the need for release as the criterion for order of discharge.

ceive wages for their work at a rate that "will provide a standard of living to the registrant reasonably comparable to the standard of living the same man would have enjoyed had he gone into the service." 32 C.F.R. § 1660.6(3). Yet, there still is no provision today for any, let alone comparable, in-service disability or dependency protection or post-service assistance of any kind — medical, educational or employment. After two or more years of compulsory service the I-O conscientious objector is left to pick up the threads of his civilian life without any of the assistance provided all others for just that purpose.

In effect, the non-compensation policy taxes the conscientious objector for "choosing" to exercise his religious beliefs by performing alternative service.[20] This tax is levied against his future and his own and his family's welfare.[21] The exclusion of I-O conscientious objectors from the vital assistance provided by the Act's educational program is the product of a vindictive and harsh policy and the Act's constitutionality should be assessed against this background.

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[20] For a sincere objector, it is the "hard choice between contravening imperatives of religion and conscience and suffering penalties." *Gillette* v. *United States*, 401 U.S. 437, 445.

That the non-compensation policy was designed to force I-O conscientious objectors to make such a "hard choice" is made clear by General Hershey, who noted the policy of no pay and no disability and dependency benefits "has been a factor in not only keeping them [I-O conscientious objectors] from going [to the camps], but once they get there they leave, and take I-A-O in the Army, when they find out." Testimony quoted in Report, *Conscience and the War, supra* at 23-24.

[21] Noting the 5,931,632 man-days of labor supplied by alternative servicemen in World War II, the Selective Service calculated the enormous financial saving to state and federal governments who received the fruits of this labor without paying any wages or other benefits. *The Operation of Selective Service*, Special Monograph No. 17, pp. 129-130 (Selective Service System 1955). The slave labor characteristics of this system cannot be ignored.

I.

Exclusion of Draftees Who Perform Alternative Service from Receiving Educational Assistance under the Act Constitutes an Unreasonable and Arbitrary Classification and Violates the Equal Protection Guarantee Embodied in the Fifth Amendment Due Process Clause.

A. *The Statutory Setting*

The Veterans Readjustment Benefits Act of 1966 dramatically affirmed the wisdom of the World War II and Korean War G.I. Bills. But, the Act is also a marked departure from its predecessors in that it provides educational assistance for service in peacetime as well as wartime. The Act created a "permanent program" of educational assistance. H. Rep. No. 1258, 89th Cong., 2nd Sess. p. 7 (Feb. 3, 1966). Assistance is provided by the Act regardless of the nature or place of the veteran's service assignment and unconditioned by the existence or potential existence of military conflict.

The Act not only instituted a permanent program for the future, it also applied retroactively to the termination date of the Korean War Bill on January 31, 1955; an estimated 3 million peacetime or cold war veterans were thereby qualified for educational benefits. See *Hearings before the House Committee on Veterans' Affairs,* 89th Cong., 1st Sess. p. 2922.

Congress was moved to enact this legislation, as its history makes clear, by one basic consideration: the draft only calls less than half those who are liable, and while those who serve have their careers interrupted and lose educational opportunities, those who do not serve freely pursue their civilian goals. Given the fact that "some individuals have to carry a grossly disproportionate share

of the burdens of citizenship," Congress concluded that educational assistance was "vitally needed to help them catch up with those of their contemporaries who were not asked to serve but who instead continued the more lucrative and comfortable pursuits of civil life." Sen. Rep. No. 269, 89th Cong., 1st Sess. pp. 3, 6 (June 1, 1965).[22]

The costs of an education program of this magnitude were unhesitatingly accepted by Congress in view of the "self-liquidating" history of the prior G.I. bills. It was noted that the World War II G.I. bill annually repays the 20 billion dollar investment at the rate of one billion dollars a year. See *Hearings before the House Committee on Veterans' Affairs, supra* at p. 2900, Sen. Rep. 269, *supra* at p. 4. In addition, there were repeated references throughout the Act's legislative history to the vast contribution to the labor force of skilled and professional people that

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[22] Senator Yarborough, the chief proponent of the Act in the Senate and chairman of the Senate Subcommittee on Veteran's Affairs, expressed the essence of the Act's educational purpose:

> "Only 40 per cent of our draft-eligible young men ever serve their country in uniform. While these men are sacrificing two to four years of their lives just at their crucial age of peak development, the 60 per cent of their counterparts are utilizing this time to further their career and develop their futures.
>
> The injustice is magnified, for we take the very men who must struggle the hardest to get ahead in life and set them two to four years behind in their competitive position . . . . [T]hey return to civilian life just as they left—unskilled, uneducated, and largely unemployable.
>
> Here is the place where the Cold War veteran needs help. He does not need a reward—what he needs is a chance.
>
> Whatever his military experience, hazardous or not, there is a need for readjustment assistance to help the Cold War veteran get his ship of success back into the mainstream of opportunity."

Hearing before the House Committee on Veteran's Affairs, 89th Cong., 1st Sess., p. 2898.

results from such G.I. bills. See *Hearings before the House Committee on Veterans' Affairs, supra* at 2916-2917; Sen. Rep. No. 269, *supra* at 4-5.

The all-inclusive coverage of the proposed legislation,[23] stirred intense opposition. The Veterans' Administration and the Department of Defense joined by a significant segment in Congress urged either outright rejection of the proposed "peacetime" G.I. bill, or at least that the provision of educational assistance be confined to periods of war or military hostilities.[24] The Act's opponents noted the fact that the uncertainties inherent in wartime and clearly in combat zone service cause actual disruption of a serviceman's life, but that such conditions were not present in the peacetime service that was required of most "Cold War" veterans. They also stressed that the proposed legislation provided full benefits to those who serve in the most quiescent periods.[25] These opponents of the "permanent program" concept offered a compromise that limited assistance to veterans who served during the Vietnam War. See H. Hear., *supra* at 2929.

But, as the terms of the Act make clear, Congress rejected every attempt to qualify educational assistance on the basis of potentially or actually hazardous service. Indeed, the conditions of service are entirely irrelevant.

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[23] There were two chief bills in Congress: S.9, on which the Senate Subcommittee on Veterans' Affairs, of the Committee on Labor and Public Welfare held hearings during the 89th Cong., 1st Sess. in February and March, 1965 (hereinafter "Sen. Hear.") and issued a report in favor of passage (hereinafter "Sen. Rep. No. 269"); H.R. 12410, on which the House Committee on Veterans' Affairs held hearings during the 89th Con., 1st Sess. in August 1966 (hereinafter "H. Hear.") and issued a report supporting passage (hereinafter "H. Rep. No. 1258").

[24] See H. Rep. No. 1258, *supra* at 18; Sen. Rep. No. 269, *supra* at 57; H. Hear., *supra* at 2944-2945, 2934, 2935, 2937.

[25] H. Rep. *supra;* Sen. Rep., *supra.*

Under the Act every person who serves in the military for 180 days or more and receives other than a dishonorable discharge [26] is entitled to full benefits [27] for the purpose of restoring his or her lost educational opportunities.[28]

The Act compensates lost time, during which education plans have been interrupted or impeded, career opportunities missed, and those who do not serve get ahead. Thus, the only variables in the Act's compensation scale are duration of service and number of dependents. The Act takes no account of the conditions or location of service. Other forms of compensation are made available for service that involves hazard or potential hazards.[29] Congress was obviously aware that hundreds of thousands of servicemen and women are in reality never even exposed to the dangers of combat or combat zones. Indeed, this was the very point made by the opponents of a "peacetime" G.I. bill. Moreover, Congress was aware that many thousands of servicemen faced the reality of combat duty

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[26] 38 U.S.C. § 1652(a)(1) provides in pertinent part: "The term 'eligible veteran' means any veteran who (A) served on active duty for a period of more than 180 days any part of which occurred after January 31, 1955, and who was discharged or released therefrom under conditions other than dishonorable. . ."

[27] 38 U.S.C. § 1661 establishes a flat compensation scale, that provides equal benefits for equal periods of service. The scale does not vary in any degree for service that was potentially or actually hazardous or for service in times of international strife.

[28] See 38 U.S.C. § 1651.

[29] See H. Hear., *supra* at 2877; see also e.g. 38 U.S.C. §§ 310-315 (Wartime Disability Compensation); 331-336 (Peacetime Disability Compensation, for veterans and dependents); 341 (Peacetime Death Compensation); § 521 (Non-Service-Connected Disability Pension, extended to veterans of the Mexican Border period, World War I and II, the Korean conflict, and the "Vietnam Era"); 1501-1502 (Vocational Rehabilitation for Service-Connected Disability); 1701 (War Orphans' and Widows' Educational Assistance).

in Vietnam. But the Act provides equal benefits to both classes. It is evident that Congress sought only to achieve its stated purpose of restoring lost educational opportunities, a loss which results from the duration, not the conditions, of service, and therefore a loss shared in equal measure by all who serve.

By its terms the Act swept in eleven years of the past and all of the future. Four million veterans who served between 1955 and 1966 were retroactively made eligible even though the service of an overwhelming number of them was in the United States during a period of peace. Moreover the Act entitles all veterans serving after the date of its passage to full benefits whether they served as a clerk-typist in Washington, D.C. or a combat soldier in Vietnam. Service women, who are exempt from duty in combat areas, are fully eligible for benefits[30] and I-A-0 conscientious objectors, assigned to civilian-type duties are also fully eligible for benefits.[31]

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[30] See *e.g.* 10 U.S.C. §§ 8549; 6015. We have been advised that under Defense Department policy women serve in combat areas only if they volunteer. One service woman was killed and six wounded in Vietnam. At present there are approximately 45,000 women in military service. Letter dated May 17, 1973, from LTC WAC Nancy K. Johnson, Coordinator, Defense Women's News.

[31] Non-combatant training and service is defined in E.O. 10028 issued on January 13, 1949:

> 1. The term "noncombatant service" shall mean (a) service in any unit of the armed forces which is unarmed at all times; (b) service in the medical department of any of the armed forces, wherever performed; or (c) any other assignment the primary function of which does not require the use of arms in combat; provided that such other assignment is acceptable to the individual concerned and does not require him to bear arms or to be trained in their use.
>
> (2) The term "noncombatant training" shall mean any training which is not concerned with the study, use, or handling of arms or weapons.

In sum, of all those who perform compulsory service in fulfillment of their Selective Service obligation, only I-O conscientious objectors are barred from receiving educational assistance to close the gap in educational opportunities created by the draft and two years of service.

B. *The Exclusion of Alternate Servicemen from Receiving Educational Assistance is Invalid under the Traditional Equal Protection Standard*

The district court, applying the familiar principles of the "traditional" equal protection standard, concluded that the challenged classification bears no rational relation to the legitimate objectives of the education assistance program enacted by Congress.

We have been unable to find regulations defining the duties of I-A-O conscientious objectors in more detail. Their deployment in World War II is discussed in *Conscientious Objection, supra,* at 105. We have been advised by a representative of the Department of Defense that since World War II it has been the policy not to limit assignment of I-A-O's to medical units. When assigned to such units they may function as lab technicians, hospital orderlies, combat medics, stretcher bearers and ambulance personnel and on administrative and supply details in the medical service field. But, we have been advised that

> "[a] conscientious objector who prefers to perform a function unrelated to the medical field, could, at his request, be utilized in any of a great variety of assignments, the primary function of which does not require the use of arms in combat. The range of assignments is practically unlimited and varies from clerk-typist to aircraft mechanic, boilerman to intelligence analyst, supply clerk to musician. In such case, the individual would be exempted from firearms training that might be required for his unit of assignment."

Letter dated June 22, 1973 from Major Fred K. Green, Assistant Director, Legislative and Selected Policies, Office of the Assistant Secretary of Defense.

The "traditional" standard prohibits, as Mr. Chief Justice Burger emphasized in *Reed* v. *Reed*, 404 U.S. 71, 75-76, "different treatment [from being] accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute." *Reed* reiterated the rule stated in *Royster Guano Co.* v. *Virginia*, 253 U.S. 415, 415, that a classification "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." And as Mr. Justice Powell stated for the Court, there must be a "legitimate, articulated state purpose," *McGinnis* v. *Royster*, 410 U.S. 263, 270.

The purposes of the Act's education program are not a subject for hypothesis or conjecture, since these purposes are explicitly enumerated by the Act itself. Moreover, the Government concedes that the first purpose of stimulating enlistments by making military service more attractive is not the primary objective of the Act. (J.S. 6). Rather, the overriding purpose of the Act is, as the district court found, "to eliminate the education gaps between persons who serve their country and those who did not." The dominance of this theme is plainly portrayed on the face of § 1651, which "declares that the education program created by this chapter is for the purpose of . . . providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty . . . [and of] aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country."

Nevertheless, the Government's intimation that the district court did not give sufficient consideration to the Act's other, albeit tangential, purpose is without support, as is plainly apparent from the opinion below. See (15a-17a).

The Government urges reversal on two grounds: first, that providing educational assistance to draftees who perform alternative service would not further Congress' goal of encouraging enlistments and therefore, the challenged classification is valid since Congress need do no more than is necessary to achieve its goals; and second, that while the educational disruption of draftees for alternative and military service is equal, Congress can constitutionally provide educational assistance solely to the latter class of draftees because of the "total disruptive effect of military service." (Gov. Br. 20).

1. The Class of Draftees who Perform Alternative Service and the Class of Draftees who Perform Military Service are Similarly Situated in Terms of the Act's Purpose of Stimulating Enlistments Since Providing Educational Assistance to Either Class has No Bearing on the Furtherance of the Enlistment Objective

Stimulating enlistments is one purpose of the Act, but it is a purpose obviously limited to those inclined to enlist. Draftees, by definition, are not so inclined. They are determined not to leave civilian life and its liberties unless conscripted. It can hardly be assumed that Congress was oblivious to this reality, and indeed it was not.[32] It is equally inconceivable that Congress decided to provide full benefits to men who have been drafted as a stimulus for either their enlistment or the enlistment of prospective volunteers.

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[32] The information available to Congress demonstrated that a majority of volunteers were motivated to enlist by the draft. See *Hearings before Special Subcommittee on the Draft of the House Committee on Armed Services*, 91st Cong., 2nd Sess., p. 12638 (1970). It was also clear that a substantial percentage of the military manpower need was met each fiscal year by inducting draftees. See *id.* at 12625.

The vast majority of veterans eligible for educational assistance were drafted or enlisted under direct compulsion of the draft. This class of draftees, including I-A-O conscientious objectors, cannot be distinguished from the class of draftees who performed alternative service. For while it is reasonable to assume that registrants inclined to volunteer are apt to respond to the incentive provided by the Act, "practical experience" (*South Carolina* v. *Katzenbach*, 383 U.S. 301, 331) permits no such assumption as to those who will not serve unless drafted. There are and always will be thousands of registrants (including I-A-O conscientious objectors), who will not leave civilian life unless compelled to do so; and the fact is that all the enlistment benefits, including educational assistance, can not and have not induced members of this class of registrants to enlist.

Nothing in the Act's history indicates Congress contemplated that educational assistance would have any real impact on draftees. On the contrary, the legislative record reflects that the Act's proponents clearly understood that the education program would not diminish the need for a draft to meet half or more of the military's manpower requirements. Encouraging enlistments and compensating lost educational opportunities pose, as one member of the House Veterans' Affairs Committee stated, "two separate and completely different problems . . ." H. Hear., *supra* at p. 2954; see also p. 2933.

Moreover, the unreality and implausibility of a plan that holds out educational assistance as an inducement to the thousands of registrants whose minds are dead set against military service, and then provides it even when these registrants must be drafted, is enough to suggest that it could not have been intended by Congress. See *United States Department of Agriculture* v. *Moreno*, — U.S. — , 93 S. Ct. 2821, 2827; *James* v. *Strange*, 407 U.S. 128. *Eisen-*

stadt v. *Baird*, 405 U.S. 438, 448. This Court will not indulge "illusory" objectives to rationalize an otherwise arbitrary classification. Cf. *McGinnis* v. *Royster*, *supra*, 410 U.S. at 276.

In sum, the provision of educational assistance to draftees, who have resisted enticements to enlist, has at least as little relation to the goal of stimulating enlistments as does the provision of educational assistance to alternative servicemen. Draftees for military service and draftees for alternative service are thus identically situated in relation to the Act's enlistment purpose. Under such circumstances fundamental concepts of equal protection require equal treatment. See *Morey* v. *Doud*, 354 U.S. 457; *Lindsey* v. *Normet*, 405 U.S. 56, 78-79.

2. Draftees who Perform Alternative Service for Two Years have Suffered Disruption of their Educational Plans and, Indeed, their Lifetime Careers to an Extent Equaling or Exceeding the Level of Disruption which Qualifies Service Personnel for Educational Assistance under the Act.

The court below based its decision on a finding that "[a]lthough military veterans and alternative service performers lead different lives, their service lives have shared one common denominator: the inability to pursue the educational and economic objectives that persons not subject to the draft law could pursue." (20a). That draftees for alternative service suffer disruption of their careers at least to the degree that renders a draftee for military service eligible to receive educational assistance is not mere happenstance, it is, on the contrary, the contemplated result of a long-standing, express national policy. Two basic governmental interests require this policy and its vigorous enforcement.

First, there are the manpower needs of the nation during periods of emergency. I-O conscientious objectors have been drafted pursuant to the Congressional power to mobilize manpower for the nation's defense. Their conscription reflects the philosophy of the Selective Service Act that no citizen is constitutionally entitled to exemption from service in the national defense that is consistent with his religious beliefs. See *Conscientious Objection,* Special Monograph No. 11, *supra* at p. 1.[33]

The second reason that compels the equalization policy is the sense of Congress that it would be unfair and politically unwise to "allow them [conscientious objectors] freedom of action." *Conscientious Objection,* Monograph No. 11, *supra,* p. 1. To this end alternative service has been deliberately designed to disrupt the lives of conscientious objectors and to prevent them from "continu[ing] to enjoy

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[33] Indeed, if alternative service were not a vital component of the defense effort it would be vulnerable to constitutional attack as an unwarranted deprivation of liberty. But, alternative service is a justifiable exercise of the Congressional power to raise armies, and this has been the basis on which such service has consistently been sustained. See e.g., *Roodenko* v. *United States,* 147 F. 2d 752, 754 (10th Cir. 1944). Alternative service assignments are "calculated to strengthen the nation in times of emergency . . . [these are not assignments to] Macy's basement." *United States* v. *Hoepker,* 223 F. 2d 921, 923 (7th Cir. 1956). These assignments bear "a real and important relation" to the "objects sought to be attained by the [Selective Service] Act [which] are national defense and military preparedness." *Atherton* v. *United States,* 176 F. 2d 835 (9th Cir. 1949). Recognizing that "[p]ractically, the system for conscientious objectors does deprive them of full liberty and requires them to work at a rate of compensation far below what they could earn . . . [d]rafting for civilian work was an important aid to the defense and welfare of the country during the war, and a necessary fulfillment of the powers granted under the Constitution." *Id.* at 841-842. See also *Weightman* v. *United States,* 142 F. 2d 188 (1st Cir. 1944); *United States* v. *Burns,* 450 F. 2d 44, 46 (10th Cir. 1971); *United States* v. *Thorn,* 317 F. Supp. 389 (E.D. La. 1970).

the fruits of civilian life." *United States* v. *Boardman*, 419 F. 2d 110, 112 (1st Cir. 1969).

The equalization policy is long-standing. In his first report to Congress the Director of the Selective Service stated:

> The general rule has been to follow Army policy in matter of this kind [extension of the term of service] as closely as possible, not because the assignees were considered to have military status, but with the idea of making the conditions of their service comparable wherever this could be done. It was felt that assignees should be neither favored, nor punished because of their beliefs, but as far as the law allowed, they should undergo the same inconveniences and receive the same benefits as the men in service.

See *Selective Service in Peacetime*, 200 (1942), reprinted at p. 9 of Brief for the United States in *Dingman* v. *United States, cert. denied*, 329 U.S. 730.

The equalization policy has been incorporated in an explicit Selective Service directive: "Always there must be an effort to see that the path of the conscientious objector in being processed for and performing civilian work parallels as nearly as possible the path of the I-A man in his processing for and performance of military duty." See Local Board Memorandum No. 98, "Determination of Appropriate Work for I-W Service," September 11, 1969. Therefore, according to a further directive of the Selective Service, alternative service assignments must be tailored to "constitute a disruption of the registrant's normal way of life somewhat comparable to the disruption of a registrant who is inducted into the Armed Forces." See Local Board Memorandum No. 64.

This policy is implemented by subjecting I-O conscientious objectors to the severe dislocations caused by the draft, which, as the Senate Committee found, has a "depressant effect" on a registrant's employment and educational potential—a factor that was deemed of critical importance to the decision to create a peacetime education program. S.Rep. 269 at 8. I-O conscientious objectors, like I-A and I-A-O registrants, are uprooted when called by the draft. It is not, as the Government cavalierly states, a "temporary" matter (Gov. Br. p. 19), nor are they merely assigned to another city. I-O conscientious objectors serve for at least two years, and, according to Selective Service regulations, they must be assigned outside of their communities, which in many cases involves posts in rural or remote locations, sometimes in camps, or in some cases, overseas.[34] The conscientious objector's employer may transfer him at will. Moreover, an assignment to a city may have an even greater disruptive effect on those conscientious objectors ordered to such assignments since the ceiling on their earnings permits them a serviceman's standard of living, while the city imposes a civilian's cost of living. This effect is magnified for those conscientious objectors who come from rural settings, particularly those from the historic pacifist sects.

There is, furthermore, no compensation for his or his family's health or welfare. The disruption experienced by conscientious objectors is further increased by the fact that they, by contrast to military servicemen, are essentially barred from learning or developing any marketable skills

[34] During the pertinent period, over 200 conscientious objectors were assigned annually to camps managed by the California State Ecology Corps. They performed firefighting and conservation work. The wage paid them ranged from 25 cents to 60 cents an hour.

Conscientious objectors were assigned to a similar camp system run by the State of Oregon.

while in the service. Selective Service regulations prohibit assignments of I-O conscientious objectors to "jobs in the competitive labor market," or to any job "which is applied for by other qualified people who are not registrants in class I-O." 32 C.F.R. § 1660.6(2).

Upon his release from service, the I-O conscientious objector is out on the streets, with no job secured for him, in an economic setting that has changed radically over the two years of his service, where technological advances may have dated whatever skills he may have possessed before he entered service, where unemployment rates are high, particularly in his age group, where those who have not served have pursued fully all of the educational and career contacts and opportunities available to them. The educational and career gap left by two years of alternative service is as wide and formidable as the gap generally left by military service.

The Government acknowledges, as the facts and express government policy make clear it must, that the educational, economic and general career disruption is equally severe for all draftees, whether they have performed military or alternative service. In an attempt to differentiate between the two classes of draftees, the Government contends, now for the first time, that military personnel suffer a "total disruptive impact" that presumably is different from the "total disruptive impact" experienced by those in alternative service. (Gov. Br. p. 20). The nature of this total disruption is never explained by the Government. Nor does the Government make clear in what respects "total" disruption exceeds or differs from the "comparable disruption" mandated by Selective Service regulations and policy for alternative servicemen. Indeed, there is no demonstrable difference.

And, it is important to note, the Government makes no claim that this "total disruptive impact" interrupts or impedes the educational careers of military servicemen more or in a different manner than the disruption experienced by those in alternative service. In fact, the Government makes no attempt to draw a rational relation between the "total" disruption and the Act's objective of providing compensation for educational disruption. As such the Government clearly fails to meet its burden under the traditional equal protection test of establishing a "ground of difference having a fair and substantial relation to the objective of the legislation." *Royster Guano Co.* v. *Virginia, supra* at 415; see also *Bullock* v. *Carter,* 405 U.S. 134, 145; *Morey* v. *Doud,* 354 U.S. 457, 465.

Nor is there any factual basis by which the Government could meet its burden. The sources of the "total" disruption—potential for hazardous duty, military discipline and greater day-to-day limitations on personal freedom—do not in fact have any bearing on the educational disruption problem, for which Congress created the educational program.

The mere potential for hazardous duty, even in cases where it has some reality, does not interrupt or impede the educational careers of those in service.[35] Nor does it seem

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[35] Moreover, it is a fact that thousands of servicemen because of "special traits or handicaps," as this Court noted in *Girouard* v. *United States,* 328 U.S. 61, 64, are assigned to duties in the United States and are not, in reality, likely to perform hazardous duty even in the event of all-out war. There is in every army a noncombatant class (not including conscientious objectors) comprised of thousands—"troops of the commissariat and intendance, of the veterinary service, of the pay and accounting department, orderlies, clerks, and bandsmen." See *Conscientious Objection, supra* at 112.

Indeed, it was stressed by proponents of the Act that even in periods of full scale war, a large percentage of the men in each branch of the Armed Forces never left the United States. See, e.g., H. Hear., *supra* at 2899, 2905.

conceivable that having refused to give special consideration to veterans who have actually served on combat duty, Congress decided to predicate educational assistance on the mere potential for such service. Such a decision is more unlikely still, given the absence in the Act of any means for distinguishing between those for whom the potential had reality and those for whom it did not.[36]

Nor has military discipline been thought to have a disruptive influence on the capacity for educational achievement. In fact educators uniformly agreed in their Congressional testimony that the discipline and rigors of military life make the veteran a more serious, ardent and mature student than his contemporaries who lack similar experience.[37] Moreover, alternative servicemen are daily

[36] I-O conscientious objectors are likewise subject to hazardous duty assignments, even in combat areas.

While neither the Department of Defense nor the Selective Service maintains records on the number of conscientious objectors who performed alternative service in combat areas, the available information, as least as to Vietnam, indicates that the number is substantial in relation to the total number of I-O conscientious objectors in service. We have been advised that a "screening" conducted by the Selective Service of some 826 files from the years 1968-1970 indicates that at least 24 I-O conscientious objectors served in Vietnam. Letter dated August 13, 1973, from Glenn R. Bowles, Selective Service Operations Officer. The Selective Service maintains no records of conscientious objectors who have incurred service-related disabilities. In June, 1973, the Selective Service first began recording medical, hardship and dependency discharges from alternative service. According to the Bowles letter, in June, 1973, 8 conscientious objectors were discharged for medical reasons and 11 for reasons of hardship and dependency. It is also confirmed in the Bowles letter that one alternative serviceman was killed in Vietnam, but the full extent of casualties for alternative servicemen in Vietnam is unknown. The Mennonite Central Committee reports that one conscientious objector attached to its Vietnam program was captured by the Viet Cong and has not yet been accounted for.

[37] See, e.g., S.Rep. 89-269 at 13.

subject to the normal disciplinary code, procedure, and penalties that exist in employment situations. Beyond this, of course, is the fact that willful failure to perform any reasonable requirement of the employer is subject to a felony prosecution.[38]

Finally, despite the day-to-day control over service personnel, a "tremendous number" have enrolled in college courses during their off-duty hours. See H. Hear., at pp. 2953, 2982-2983; S. Hear., at pp. 70-71. Moreover the services have extensive vocational, technical and educational programs of their own. See H. Rep. 89-1258 at p. 18; H. Hear., at pp. 2918, 2953. The Act itself indicates that service personnel have been assigned to civilian institutions for civilian course work. See 38 U.S.C. § 1652a(3); H. Rep. 89-1258 at p. 8.[39] And, in 1970, Congress created "PREP" (Predischarge Education Program), 38 U.S.C. §§ 1695, et seq., providing assistance for any person who has served on active duty in the military for more than 180 days to complete a secondary education or to take preparatory courses for post-discharge college or vocational education. This program also provides educational and vocational guidance.

Essentially, the Government's argument is that the Act's education program is not designed to compensate the educational disruption caused by service, but to compensate the "total" disruption experienced by service personnel.

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[38] See 32 C.F.R. § 1660.8; see *United States* v. *Burns*, 450 F. 2d 44 (10th Cir. 1971).

[39] Appellee in this case attended night school at Boston University for two years to complete his final college year. Many in military service have done the same. But, attending school part-time, while working full-time, certainly diminishes the intellectual experience and overall opportunities that a sustained, full-time college education has to offer. It therefore is quite appropriate for the Act to provide benefits to veterans who have attended school during their off-duty hours, since their education, like appellee's, was "interrupted and impeded" by virtue of their service.

The Government's position is merely a restatement of its argument, now abandoned, that educational assistance is compensation or a reward for hazardous or potentially hazardous duty (see J.S. 6). Both are attempts to add a substantive purpose for the education program to those substantive purposes the Act specifies. The present attempt is no more justifiable than the last.[40] It is based on pure

[40] For example, the Senate report expressly rejects any intimation that educational assistance is compensation, bonus or reward for exposure to the hazards of military service, as being contrary to the "philosophy and purpose of the GI bills [which] is and has been to give readjustment assistance to the veteran returning to civilian life after substantial military service and not to reward him for the risk that he might have been exposed to." S.Rep. 89-269 at 19.

Indeed the legislative record is replete with statements by the Act's proponents that its purpose was solely to provide assistance for a service-connected disability, educational disruption. As Congressman Pepper, who as a Senator during World War II was a leading sponsor of the original G.I. Bill, stated:

> The first two G. I. bills were not designed as sops for those who had borne the battle, nor as bounty pay. They were designed to assist all those who served, not merely those who had shot or been shot at. To my knowledge, there is no adequate way of repaying a man for the risk of his life, or for the gift of it. There are, however, ways of repaying him for his time and his services, and the G. I. bills embody such ways.

H. Hear., at 2983. Congressman Fascell emphasized during the same hearings, *id.* at 3059:

> Most of the cold war vets did not engage in actual combat as did their predecessors but this legislation is not intended to be a reward to our young men for risking their lives. The purposes of the cold war GI bill is to restore lost opportunities to our servicemen, to give them a fighting chance to catch-up with the world they left as civilians.

Senator Yarborough also stated, Sen. Hear., at p. 8:

> This is not a halfway proposal to reward only those who see hazardous duty, or some select group of servicemen—for

speculation as to motive, and ignores the best, and, in this case, conclusive evidence of Congress' purposes in creating the education program, namely the terms and operation of the Act itself.

The lack of textual support for the Government's position is underscored by the fact that its only reference to the Act is to the word "readjustment" in the title. (Gov. Br. p. 20, n. 18). On this basis, the Government concludes that Congress was not merely concerned with the educational readjustment of veterans, but rather with their "readjusting to civilian life" in general. But the Act's title does not bear any such inference, and the actual terms of the Act are directly to the contrary.

If Congress intended a broader purpose for its education program than restoring lost educational opportunities, it could easily have said so. Indeed, as the Korean War G.I. bill (38 U.S.C. §§ 1601 et seq. (1952) repealed by P.L. 89-358, § 4(a), 80 Stat. 23) makes clear, Congress' education program has been and is solely and specifically for the purpose of compensating educational disruption. The prior Act's "Statement of Policy" provides dispositive evidence.[41] That statement draws the critical distinc-

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educational opportunity cannot be used to salve our conscience for sending men to war. Rather this is the recognition that there is a segment of our population that suffers from lack of opportunity, and that is the entire cold war veteran population. Their need is not based on the type of military duty they performed, but on the lack of opportunity to readjust back to civilian life after having been removed for 2 to 4 years.

[41] "STATEMENT OF POLICY

The Congress of the United States hereby declares that the veterans' education and training program created by this Act is for the purpose of providing vocational readjustment and restoring lost educational opportunities to those service men and women whose educational or vocational ambitions have been interrupted or impeded by reason of active service in the Armed Forces during

tion between the education program's objective of recouping lost educational opportunities and the broad readjustment purpose of "assisting in the readjustment . . . [of veterans] from military to civilian life," which was the specified objective to be served by the farm and business loan and bonus provisions of that Act. This distinction was strongly emphasized by the 1952 Act's authors:

> Title I gives as a short title of the bill, the "Veterans' Readjustment Assistance Act of 1952." The statement of policy makes clear that the purpose of this proposal is to provide vocational readjustment and to restore lost educational opportunities to those service men and women whose educational and vocational ambitions have been interrupted or impeded by reason of service during the emergency in one of the branches of the Armed Forces. This is the fundamental philosophy underlying the educational provisions of the bill, and it is well to keep this philosophy in mind in the consideration of such provisions. It further emphasizes that the other programs under the bill are intended to provide readjustment assistance.

See H. Rep. No. 82-1943, 82nd Cong., 1st Sess., pp. 27-28 (1952).[42]

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a period of national emergency and for the purpose of aiding such persons in attaining the educational and training status which they might normally have aspired to and obtained had they not served their country; and that the home, farm, and business-loan benefits, the unemployment compensation benefits, the mustering out payments, and the employment assistance provided for by this Act are for the purpose of assisting in the readjustment of such persons from military to civilian life."

[42] The Government's house of cards argument topples when it is noted that the term "readjustment" is used in the present statute solely in relation to the vocational rehabilitation goal. Moreover, the education program is codified under the title "Veterans' Educational Assistance."

The 1966 Act creates purely an educational program. The various non-education assistance programs, such as farm and business loans, provided in the Korean War bill for general readjustment were expressly deleted from the 1966 Act. Thus, S.9 contained general readjustment programs, although scaled down from their Korean War models because of the "peacetime" service involved, S. Rept. 89-269, at 15-17, but none of these programs were adopted by the House, which substituted the substance of its bill for that of S.9. The House bill was, from its inception, solely an education program, with the purpose, as emphasized by the Veterans' Affairs Committee, "to provide assistance which would help the veteran to follow the educational plan that he might have adopted had he never entered the Armed Forces." H. Rept. 89-1258, at 5.

That the education program was designed to restore lost educational opportunities, not to compensate for a "total" disruptive effect, is thoroughly borne out by the Act in practical operation. Since the Act creates a permanent program, eligibility for which is based solely on time in service, it necessarily provides compensation to thousands of servicemen and women who have experienced no more disruption to their lives or educational careers than is caused by the mere fact of two years' service. Thus, full benefits are available to those who served in periods of undisputed peacetime or in assignments which involved no real potential for combat or combat zone duty. Members of military bands, occupants of safe desk jobs, I-A-O conscientious objectors assigned by their preference to employment, such as clerk-typists in non-medical units, servicewomen who do not volunteer for combat zone duty, are some of the thousands of veterans who performed civilian-type duties in the United States, for whom the rigors of service were far from "totally disruptive. Moreover, full

benefits are provided without regard to whether the draftee service were far from "totally" disruptive. Moreover, full munity and had a nine-to-five job on the military base as a file or stock clerk. Full benefits are provided even if the veteran is one of thousands who attend college courses during their off-duty hours.[43]

It must be presumed that Congress understood the breadth of the Act's eligibility criteria, and that educational assistance would be provided not only to those who served in foreign posts, in combat, or in wartime, but also to thousands whose service involved no risks or hazards. Indeed, the legislative history demonstrates Congress' clear awareness of both types of service. It further demonstrates that the authors of the Act viewed educational assistance not as compensating for the general rigors of military life, but as a practical program relevant to all in service because they all lost the same amount of time—time which could have been spent in school or on a job and time which was spent by those who did not serve in pursuing civilian goals at a full and unimpeded pace. In sum, as Senator McGee concluded in testimony before the Senate Subcommittee, "[t]he common denominator of all, however, is the real fact that they have given up at least two years of their

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[43] If Congress had intended to limit educational assistance to those who were actually liable for hazardous duty, it unquestionably had the means at hand to prescribe eligibility criteria that would achieve that objective. See e.g. 38 U.S.C. §§ 101(6)-(9), (11), (29); 312; 331; 341; 343; 354; 541; 542; 757; 1502; 1701; 1701(a)(3); 1802; 1901; 2011; 2012; 5 U.S.C. § 2108(1); 39 U.S.C. § 3401; 42 U.S.C. § 4876(c)(4). In view of the precision vocabulary available to Congress if it chose to condition or scale educational assistance on the basis of the nature of service involved, the absence of such limiting terminology is irrefutable evidence that Congress intended to include all veterans with regard only to the length of their service.

See also Korean War G. I. Bill, *supra*.

lives at a crucial period to serve where their country needs them the most." S. Hear. at p. 164.[44]

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[44] That the time factor is the base denominator is a point made over and over in the legislative record. The Senate Report, for example, notes that the cold war required an unprecedented "period of compulsory military service during an era of relative peace" and concludes that it is the draft, "which calls only a select group of men away from their private lives," that is the basis for providing "readjustment aids so vitally needed to help them catch up with those of their contemporaries who were not asked to serve but who instead continued the more lucrative and comfortable pursuits of civil life." The committee found particularly compelling the disparity of education opportunity inherent in the student deferment. "The draft in actual operation exacts from one man considerable sacrifices in time and loss of earning power, interruption of education, separation from home and family to say nothing of the sacrifice of personal liberty, while leaving his civilian contemporary to pursue a normal life." At 12-13; see also 20.

In his testimony before the House Committee, Representative Baring, a sponsor of the House Bill, demonstrated the needs of post-Korean War veterans for educational assistance are essentially the same as the veterans of World War II and the Korean War. The previous G.I. bills are direct precedent for the present Act, because said Representative Bearing, "[l]ike the veterans under the previous G.I. bills, post-Korean veterans lost time from their competitive civilian lives directly because of military service. As a consequence, they lose valuable opportunities ranging from education advantages to worthwhile job possibilities and potentially profitable business ventures." (2889).

Noting the large percentage of servicemen who never served overseas during World War II and the Korean War, Senator Yarborough pointed out that they received educational assistance at the full rate of compensation. This, he explained, is because "[t]he educational progress and opportunity of this sizable group of persons has been impaired in just as serious and damaging a fashion as if they had served on distant shores. Their educational needs are no less than those of their comrades who serve abroad." (2899). While soldiers serving in combat zones deserve additional benefits, the Senator declared, this should not be achieved by "provid[ing] benefits only to them which should go to all servicemen currently being discharged." (2899-2900); see also 2910.

Representative Fascell in his testimony, stated:

The Government does not concede that Congress intended what the Act in its operation necessarily achieves. Rather, the Government takes the position that in providing benefits to service personnel who do not suffer "total" disruption, but merely disruption of their educational careers, the Act is permissibly overinclusive. (Gov. Br. p. 19 n. 17). Justification is drawn from the notion that "mathematical nicety" is not required by the traditional equal protection test. See *Dandrige* v. *Williams*, 397 U.S. 471, 485.

The "mathematical nicety" concept has no place in this case.

First, this is not a case where only a few random individuals on either side of the classification line are similarly situated, but are being denied equal treatment. The whole class of I-O conscientious objectors who perform alternative service and who, indisputably, suffer disruption of their educational careers has been absolutely excluded from receiving any compensation for this disruption. This class suffers educational disruption to the same degree as a class comprised of thousands of service personnel who receive educational assistance, but who have not experienced the

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"Servicemen's need for assistance bears no relation that I can see to the hazardous or non-hazardous nature of their assignments. The personal losses of time and opportunity which they suffered are just as great whether they served in Europe, Korea, the United States or Vietnam." (3059), see also 3086.

Testimony before the Senate sub-committee consistently reflects this concept of interruption. As Senator Mondale summarized:

> [T]he World War II and Korean GI bills made no distinction between those who served in the front lines and those who served in a safe stateside job—they applied to everyone. The previous GI bills were not designed to reward veterans for the battle risks they ran, but were designed to assist them in readjusting to civilian life and in catching up to those whose lives were not disrupted by military service. And that is what the cold war GI bill is intended to do. (S. Hear. at 152).

"total" disruption poised by the Government. This is not mere imprecision, this is gross discrimination, which has no rational justification. See *United States Dept of Agr.* v. *Moreno, supra.* It is all the more intolerable because of its unwarranted punitive effect on the excluded class. See *James* v. *Strange,* 407 U.S. 128; 141-142; *Rinaldi* v. *Yeager,* 384 U.S. 305; *Lindsey* v. *Normet,* 405 U.S. 56, 76-78; *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619, 93 S. Ct. 1700.

Second, cases such as *Dandridge* v. *Williams, supra* are fundamentally distinguishable from this case. Those cases tolerate relatively minor departures from the equal protection norm—that those similarly situated be accorded similar treatment. In each case the State demonstrated countervailing necessity for such toleration. But, necessity has been sustained only where certain special circumstances were present.

Thus, one common characteristic of cases like *Dandridge* is that they involve formulas for apportioning benefits among competing recipients, and not as here a flat exclusion from benefits. See e.g., *San Antonio Indep. School Dist.* v. *Rodriguez,* 411 U.S. 1, 93 S. Ct. 1278; *Jefferson* v. *Hackney,* 406 U.S. 535.

Moreover, such cases pose intractable problems whose solution may not be within present or foreseeable understanding. Thus, in welfare cases, the question is generally at what point the cut-off line should be drawn to conserve scarce funds. Persons on either immediate side of the line will not be treated fairly. However, the problem of unfair treatment at the cut-off line will exist no matter where it is drawn short of total inclusion. Leeway in tax matters has been granted for this very reason. See e.g., *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 411 U.S. 910, 93 S. Ct. 1001. As the Court stated in *San Antonio Independent Sch. Dist.* v. *Rodriguez, supra* at 1301:

"In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause."

Rodriguez also indicates that a further basis for deference arises where the proposed alternative tax formula is "only recently conceived and nowhere yet tested." 93 S. Ct. at 1308.

This case involves an absolute exclusion from all educational assistance. Compare, *United States Dept. of Agr.* v. *Moreno, supra; Gomez* v. *Perez,* 409 U.S. 535; *James* v. *Strange, supra; Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164; *Morey* v. *Doud, supra.* Neither Congress nor the Executive has demonstrated any sensitivity to the harsh conditions imposed on I-O conscientious objectors. Indeed, the challenged exclusion is part of a comprehensive pattern of exclusions from compensation programs directed at the class of I-O conscientious objectors. The challenged classification is not designed to conserve funds. Given a program that is virtually open-ended as to funds and recipients, that has already expended billions of dollars and funded millions of recipients, and that has consistently paid itself off in increased tax revenues, it cannot reasonably be thought that the exclusion of the only similarly situated class of potential recipients, a class comprised of a few thousand members, was effected to conserve funds. Nor is the Court required to tamper with a delicately balanced formula for distributing funds. There is neither delicacy nor balance about the present classification. Finally, Congress has, in the area of veterans assistance programs, demonstrated fully its capacity to draw mathematically nice classifications consistent with its purposes. In these circumstances, the

challenged classification cannot be sustained as a tolerable deviation from "mathematical nicety."

3. The Challenged Exclusion is a Product of the Non-Compensation Policy and Serves No Legitimate Purpose

It makes no difference whether, in adopting the non-compensation policy, Congress shared in or merely responded to the public resentment against I-O conscientious objectors. The punitive character and effects of that policy are the same in either case. For, pursuant to that policy, when a I-O conscientious objector is drafted and performs alternative service as a means of exercising his religious beliefs, he must forfeit all of the protective compensation for service-related disabilities that is provided to every other draftee.

The Act involved here provides compensation for the educational and career disabilities resulting from military service. I-O conscientious objectors receive no compensation, even though they suffer the same disabilities because of their service. This man has a career and future, like any other draftee; he has a family, like any other draftee, but unlike every other draftee he must sacrifice two years of his career and future and jeopardize his own and his family's welfare when he serves his country. The Act not only deprives the I-O conscientious objector of vital compensation, which leaves a two year gap between him and those who have not served, but it widens the gap as well by assisting every one else who served to catch-up with those who did not. In sum, the I-O conscientious objector is placed and held by the Act at the bottom of the educational and career opportunity ladder.[45]

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[45] The challenged exclusion from educational assistance feeds off public resentment and at the same time fosters it. Congress' treatment of these men strengthens public attitudes of prejudice. As a result, public and private institutions throughout the country

The exclusion from educational assistance is a product of the non-compensation policy. There is evidence in the Congressional debates during World War II that this policy was deliberately designed to punish I-O conscientious objectors for their beliefs. There was strong feeling in Congress, as in the public generally, that the beliefs of I-O conscientious objectors presented a danger to the security of the country. As one observer notes,

> "Social resentment of the conscientious objector does not stem from any real threat objectors pose. For example, there have always been fewer conscientious objectors than there have been draft dodgers; yet the nation has tended to treat the draft dodger as a delinquent and a nuisance, while it has often felt that the conscientious objector is a threat to its very -exist ence." Schlissel, *supra* at 24.

Such sentiments have even found their way into opinions of this Court:

> "And it is evident that the views of applicants for naturalization in respect of such matters may not be disregarded. The influence of conscientious objectors against the use of military force in defense of the principles of our Government is apt to be more detrimental than their mere refusal to bear arms."

United States v. *Schwimmer*, 279 U.S. 644, 651; but see dissenting opinion of Mr. Justice Holmes, joined by Mr. Jus-

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limit relief for service disruption to veterans as Congress has defined them. For example, no state veterans' preference or assistance in employment, health care, housing, recreation, education, taxes, business loans or other general welfare programs is extended to I-O conscientious objectors. The same exclusion carries over into educational and employment preferences or assistance in the private sphere.

tice Brandeis, at p. 653. See also majority and dissenting opinions in *United States* v. *Macintosh*, 283 U.S. 605, 631.

There is no direct legislative history relating to the challenged exclusion in this case. However, the punitive purpose of this provision is discernible from a related provision, 38 U.S.C. § 3103. Section 3103 disqualifies from educational assistance, as well as from all other veterans' benefits, any serviceman discharged as a result of a general court-martial conviction or any serviceman who is "discharge[d] . . . on the ground that he was a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority . . ." Thus, no matter how long, faithful and hazardous his service, a serviceman who is discharged as a conscientious objector is treated as a felon and stripped of all compensation he has earned and needs.

Another statutory provision, 20 U.S.C. § 425, highlights Congress' disposition towards I-O conscientious objectors. This provision suspends interest accrual and the repayment obligation on National Defense Education Act loans for students while they are members of the Armed Forces, the Peace Corps or Vista. No suspension or relief of any kind is provided I-O conscientious objectors, who have received loans under the National Defense Education Act. During his two or more years of service the I-O conscientious objector bears the full burden of repaying these loans and the interest accrues annually.[46] I-O conscientious ob-

[46] The United States Commissioner of Education is required to "encourage" the adoption of similar provisions by states and nonprofit institutions for their student loan or loan insurance programs. See 20 U.S.C. § 1078(e). Thus, for example, I-O conscientious objectors are excluded from the provision suspending repayment and interest accrual for loans under the New York Education Law § 653.

jectors are similarly excluded from the interest suspension provisions applicable to members of the Armed Forces, Peace Corps and Vista for federal insurance on education loans. See 20 U.S.C. § 1077(a)(2)(c).[47]

Under 42 U.S.C. § 1410, public housing authorities are required to utilize an "applicant's status as" or mere "relationship to" a serviceman or veteran as a preference factor for admission to federally assisted low-rent housing projects. Similar preferences are found in other general welfare provisions of the Code.[48]

Peace Corps volunteers are granted financial allowances for living, travel, housing, leave, and clothing expenses; readjustment allowances; disability benefits; health care; Civil Service retirement and seniority credits, leave entitlement, lay-off rights commensurate with period of servive; legal expenses; allowances and expenses for minor dependents; moving expenses; counseling and assistance in obstaining educational and employment opportunities. See 22 U.S.C. § 2504. See also as to additional compensation for Peace Corps volunteers, 22 U.S.C. § 2505; and as to tax exemptions, 26 U.S.C. § 912. Similar provisions are made for Vista workers and members of the Job Corps, see 42 U.S.C. §§ 2727, 2729, 2994b. Neither I-O conscientious objectors drafted for alternative service, nor their dependents, receive any assistance for disability, death, rehabilitation or general health care or welfare.

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[47] A three year loan suspension provision applicable to members of the Armed Forces was incorporated by Congress in 1944 in a general loan program for students working toward doctorate degrees in certain medical fields. In 1963, the suspension provision was amended to include members of the Peace Corps. See 42 U.S.C. § 294a(c)(2). Students pursuing nursing degrees also are not required to repay government loans while they are members of the Armed Forces, see 42 U.S.C. § 297b(b)(2).

[48] See, e.g., 42 U.S.C. § 1410(g)(2); 42 U.S.C. § 1477; 22 U.S.C. § 2456(a)(2); 4 U.S.C. § 107.

This long-standing, unremitting and unqualified pattern of treatment that tightly weaves a dress of deprivation and hardship around the alternative serviceman and his family compels only one conclusion about the purpose of the challenged exclusion. Its purpose is clearly to punish I-O conscientious objectors for adhearing to their beliefs. This purpose is a patent violation of the Fifth Amendment Due Process Clause, "[f]or if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group can not constitute a *legitimate* governmental purpose." *United States Dept. of Agr.* v. *Moreno, supra,* 93 S. Ct. at 2826. That is peradventure the case where, as here, the focus of harm is a religious group. *Sherbert* v. *Verner,* 374 U.S. 398, 402.

The non-compensation policy and its progeny, including the presently challenged classification, may not necessarily be viewed as deliberately punitive, but rather as a policy adopted in response to or from fear of an anticipated backlash from those segments of the public, whose hatred for conscientious objectors was well known in Congress.[49] This may explain, but it does not justify Congress' actions. It is quite possible that Congress, in an attempt to avoid even

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[49] As Senator Bridges stated during hearing before the Senate Committee on Military Affairs:

> I have been very interested in what has been defined here as the difference between a conscientious objector and a slacker. I think that perhaps most people—in fact, I know that most people—have a tendency to look on them as slackers rather than as conscientious objectors. There is a very deep feeling in the country on this subject. The correspondence I have received indicates that there is a deep feeling, for instance, in my state. There is a small group of people located there that I know feels very deeply on the rights of the conscientious objector. On the other hand, I would say, from the evidence you get through correspondence and personal contact, that the feeling is very bitter the other way—very bitter.

the appearance of favoring I-O conscientious objectors, consistently erred far on the side of unfair and harsh treatment. But political squeamishness is no justification for the kind of gross discrimination involved here. See *Eisenstadt* v. *Baird*, 405 U.S. 438, 454; *United States Dept. of Agr.* v. *Moreno, supra.* As Mr. Justice Jackson stated in his concurrence to *Railway Express Agency* v. *New York*, 336 U.S. 106, 112-113:

> The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

4. Strict Judicial Scrutiny of the Challenged Classification Is Mandated in this Case

The gross inequality and punitive impact produced by the absolute exclusion of I-O conscientious objectors from participating in the Act's educational program are without any reasonable justification. The challenged classification therefore fails to satisfy the "traditional" equal protection test, and *a fortiori* the "heavy burden of justification" imposed by the rule of "strict judicial scrutiny." See *Dunn* v. *Blumstein*, 405 U.S. 330, 343; *San Antonio Independent Sch. Dist.* v. *Rodriguez, supra*, 93 S. Ct. at 1288.

In this case, the burden of the Government under strict judicial scrutiny is to demonstrate that the exclusion of I-O conscientious objectors whose compulsory alternative service has taken two years of their educational life, is precisely and narrowly tailored to serve the Act's legitimate, compelling purposes and is the "least drastic means" for effectuating those purposes. *Police Dept.* v. *Mosley*, 408 U.S. 92, 101.

Strict scrutiny is required where legislative discrimination "interfere[s] with fundamental constitutional rights or . . . involve[s] suspect classifications." *San Antonio Independent Sch. Dist.* v. *Rodriguez, supra*, 93 S. Ct. at 1287. Both of these routes to the strict scrutiny level exist in this case.

a. The Challenged Classification Interferes with the Fundamental Constitutional Right to the Free Exercise of Religion

Together, the Selective Service Act and the Veterans' Readjustment Benefits Act regulate the eligibility for and the conditions under which a person may exercise his religious scruples against military service. It is beyond doubt that the subject of regulation in this case is the fundamental constitutional right to the free exercise of religion.

The history and nature of religious opposition to war and military service is familiar to this Court. A small number in every age have responded to dictates emanating from the heart of their religious being, that they shall not kill, they shall not engage in war. For the conscientious objector, "war is not only evil, but the epitome of evil, involving the destruction of human life, indeed the destruction of all moral and spiritual values." Cornell, *The Conscientious Objector and the Law*, 2 (1943).

Witness to the centrality of this belief in the religious code of the conscientious objector is their tested willingness to suffer extreme penalties for their beliefs. They have been imprisoned and even executed, their property has been seized, they have been forced to work for years without pay or compensation for sickness and economic loss, their dependents have been compelled to live in poverty and on the edge of starvation, they and their families have been driven from their communities, isolated from their fellow citizens and subjected to public scorn and calumny. See generally Schlissel, *supra*.

To say that the state may, for compelling reasons and with scrupulous precision, regulate or, possibly, in extreme instances, curtail an exercise of religious freedom, is not at all to say that the fundamental right is negated. See *Wisconsin* v. *Yoder*, 406 U.S. 205, 220; *Sherbert* v. *Verner*, 374 U.S. 398; see also *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304; *Meyer* v. *Nebraska*, 262 U.S. 390, 403; *Pierce* v. *Society of Sisters*, 268 U.S. 510, 534. Quite the contrary, the heavy burden of justification the Government bears for actions "affecting" a religious right signifies affirmation of the right's preferred position under our Constitution.[50] See *Police Dept.* v. *Mosley*, *supra* at 98-101.

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[50] There is *dictum* in decisions of this Court suggesting that conscientious objectors have no constitutional right to a draft exemption. See e.g. *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29. But, of course, the right to a draft exemption is not remotely relevant to this case. The class of I-O conscientious objectors involved here, have fully performed their Selective Service obligation, and they do not contest the power of Congress to compel such service. Moreover, the *dictum* actually reinforces the point that conscientious objection is a protected exercise of religious freedom, since the Court expressly noted in each case the compelling national interests that required overriding the individual's scruples against military service. See e.g., *Selective Draft Law Cases*, 245 U.S. 366, 378. This analysis comports fully with strict scrutiny requirements of both the First and Fifth Amendments. Cf. *Wisconsin* v. *Yoder*, *supra*.

As the Court stated in *Wisconsin* v. *Yoder, supra* at 214:

> [O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is time that activities of individuals, even when religiously based, are often subject to regulation by the states in their exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. See, e.g., *Gillette* v. *United States*, 401 U.S. 437 (1971); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1879). But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the state to control, even under regulations of general applicability. E.g. *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940).[51]

Congress has vouchsafed the conscientious objector's right to exercise his religious beliefs. But, in regulating rather than overriding the right, Congress' classifications are no less the subject of strict scrutiny. Nor does the fact

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[51] This, of course, comports with the principles generally applicable to the First Amendment rights of speech, association and assembly. Thus, while picketing or their expressive conduct may be subject to regulation for compelling state reasons, there is unquestionably a constitutional right of freedom of speech involved, see *United States* v. *O'Brien*, 391 U.S. 367, 376-377; *Kleindienst* v. *Mandel*, 408 U.S. 753; *Cantwell* v. *Connecticut, supra* at 304; and that right commands strict judicial scrutiny of legislative classifications "affecting" it, see *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 98-99; *Fowler* v. *Rhode Island*, 345 U.S. 67; *San Antonio Ind. Sch. Dist.* v. *Rodriguez, supra.*

that Congress is exercising the power to raise armies diminish the necessity for strict scrutiny. That power does not automatically override the exercise of fundamental freedoms. See *United States* v. *O'Brien, supra; United States* v. *Robel,* 389 U.S. 258, 262-264. Even those governmental interests of the "highest rank," are, as the Court declared in *Wisconsin* v. *Yoder, supra* at 214, "not totally free from the balancing process when . . . [they impinge] on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause . . ." [52]

In *Gillette* v. *United States,* 401 U.S. 437, the Court essentially recognized that the assertion of conscientious objection is an exercise of religious freedom, which cannot be impaired or burdened unless the regulations meet the demands of the Free Exercise Clause. The Court rejected a claim that the Congress' refusal to recognize selective conscientious objectors violated the Free Exercise Clause. But, it is important to note that the Free Exercise claim was not dismissed on the grounds that conscientious objection involves no right of religious freedom. Rather the Court treated the claim on the merits, under the generally applicable Free Exercise standards, and concluded that Congress' action was "strictly justified by substantial governmental interests that relate directly to the very impacts questioned." 401 U.S. at 462.

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[52] Strict scrutiny is required even though the state has provided the means or forum for the exercise of the constitutional right. Thus, while the state may exclude all speakers from a public park, a regulation that discriminates among speakers is subject to strict scrutiny. See *Niemotko* v. *Maryland,* 340 U.S. 268; *Police Dept.* v. *Mosley, supra.* Similarly, in cases involving the right to receive information through the mails, the Court has held that although the means by which the right may be exercised is in the control of Congress, the normal constitutional standards of review still apply. See *Lamont* v. *Postmaster General,* 381 U.S. 301.

Whether the exclusion challenged here violates the Free Exercise Clause is a matter dealt with *infra*. For present purposes of the strict scrutiny test under the Fifth Amendment guarantee of equal protection, it is enough that these cases demonstrate the existence of a constitutional right, which the Government itself acknowledges (Brief for Respondents, *Hernandez* v. *Veterans Administration*, pp. 20-22). Thus, under the firm rulings of this Court, the applicable equal protection test in this case involving the validity of regulations affecting the exercise of fundamental rights, is strict scrutiny. *Dunn* v. *Blumstein, supra; Shapiro* v. *Thompson*, 394 U.S. 618; *Chicago Police Dept.* v. *Mosley*, 408 U.S. 92, 98-99.

b. In Singling Out I-O Conscientious Objectors As The Only Class of Draftees To Be Excluded From Receiving Educational Assistance, The Act Embodies and Operates Upon A Suspect Classification

The challenged classification, considered alone and as part of the broader non-compensation policy, focuses narrowly on a group of people marked and identified by their religious objection to war. They have been singled out of the millions of men drafted to serve their country, as the only draftees who receive no compensation whatsoever for the educational and career disabilities their service has caused. All draftees, no matter what the nature of their service, suffer educational disruption in equal measure. They all have had their educational plans abruptly suspended when their number was called, they all served full-time duty that prevented them from taking advantage of educational and career opportunities while their counterparts, who did not serve, were free to exploit these opportunities to their fullest. However, only one class of draftees, is totally cut off from vital educational assistance. These

draftees are distinguished from all other draftees, not by any characteristic relevant to the purposes of the Act's education program, not by the duration or nature of their service, not by the educational disruption resulting from service, but solely by their religious beliefs that mark them as I-O conscientious objectors.

I-O conscientious objectors constitute one of the "discrete and insular minorities" for whom the normal political processes offer insufficient or no protection against discriminatory or punitive legislation. See *United States* v. *Carolene Products* Co., 304 U.S. 144, 152 n. 4. "Particular religious . . . minorities" were the first cited in that celebrated footnote in constitutional law, as historically being without access to political forums and therefore in need of special protections akin to a form of judicial guardianship.

Footnote four of the *Carolene Products* case has been implemented in recent decisions of the Court holding that classifications focusing on race, see *Loving* v. *Virginia*, 388 U.S. 1; *Bolling* v. *Sharpe*, 347 U.S. 497; and alienage, see *Sugarman* v. *Dougall*, — U.S. —, 93 S. Ct. 2842; *In re Griffiths*, — U.S. —, 93 S. Ct. 285, trigger strict judicial scrutiny of the legislation involved. In *Frontiero* v. *Richardson*, — U.S. —, 93 S. Ct. 1764, four Justices found sex, or at least classifications focusing on women to be suspect. The common subject in each of these cases is a group of persons who are or have been treated as a powerless minority and whose membership is clearly definable, has little or no access to the political process and has historically been the focus of public prejudice. Measured against the criteria established by these decisions, it is plain that I-O conscientious objectors unmistakably possess both the characteristics of a suspect classification and the need for denomination as such.

There is, as we have discussed *supra*, a consistent pattern in the long history of treatment accorded consci-

entious objectors in this country. See generally, Schlissel, *Conscience in America, supra;* Russell, 20 G. W. L. Rev., *supra* at 412-420; *Conscientious Objection,* Special Monograph No. 11, pp. 34-39. In each period conscientious objectors were able to gain some relief by demonstrating their resolute determination to not relinquish their faith upon any pain or penalty. Both futility and respect were attitudes that prompted conciliatory legislation. But, these attitudes were overwhelmed in periods of crisis, by public hatred for those regarded as "hiding behind the skirts of their religion." See *Hearings before the Senate Military Affairs Committee,* 77th Cong., 1st Sess., p. 6 (Aug. 19, 1942). There may never have been, in this country, a more publicly despised minority, than I-O conscientious objectors during wartime.

That by their martyrdom I-O conscientious objectors have received legislative recognition of their beliefs in no way implies that they have or have had access to the political process. See *Gillette* v. *United States,* 401 U.S. 437, 445, 452, 453. Indeed martyrdom as means of reaching political power is the hallmark of groups that are excluded from political forums. The political impotence of I-O conscientious objectors is underscored by the very punitive nature of the non-compensation policy, which is at the heart of this case. And indeed, no other group is likely to have less political influence when they need it the most, than I-O conscientious objectors.

> As objectors to war they were always suspected by the community of cowardice and disloyalty. And they, in turn, tended to demand their "rights" precisely at the time when society was most aroused. The pacifist asked for tender treatment when the nation was sore with conflict. *Schlissel, supra* at 32.

Nor do the alternatives, imprisonment or sacrifice of two years of educational and career opportunities, resemble the type of alternatives Congress is likely to provide groups who have access to the political process.

By contrast to *Rodriguez, supra,* the boundaries of the class involved here are brightly identified; this case concerns a government registered, card-carrying minority. Moreover, the educational assistance I-O conscientious objectors are seeking has been absolutely denied them.

While conscientious objectors may not be born with their moral convictions, once acquired, they become an indelible trait, which is conspicuously exposed to the full impact of public resentment and abhorrence during periods when the possessor has no source of protection other than the courts.

c. The Confluence in this Case of Fundamental Constitutional Rights and Closely Related, Important Social and Personal Interests Mandates Review of the Challenged Classification at the Highest Degree of Intensity on the "Spectrum of Standards"

By virtue of the foregoing, this case indubitably satisfies the requirements for strict judicial scrutiny under the "spectrum of standards" approach. This approach, as Mr. Justice Marshall explained, "comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." *San Antonio Independent Sch. Dist.* v. *Rodriguez, supra,* 93 S.Ct. at 1330 (dissenting opinion). The "spectrum" approach requires heightened judicial scrutiny as the "nexus between the specific constitutional guarantee and the nonconstitutional interests draws closer," or to the degree that a traditionally powerless minority or class has been singled out for dis-

advantageous treatment. See 93 S.Ct. at 1332-1333. This approach supplements the prevailing two category analysis, for those cases that do not fall neatly into one or the other category.

The challenged classification in this case obviously requires strict scrutiny under the prevailing analysis because it abridges the fundamental right to the free exercise of religion and focuses directly and exclusively on a classic "discrete and insular" religious minority, conscientious objectors. But, that the non-constitutional interests and other pertinent factors involved here, rank this case at the highest level on the "spectrum of standards" is merely further confirmation that this is a preeminent case for strict judicial scrutiny.

First, education is recognized by the majority, as well as dissenters in *Rodriguez,* as an interest of the most fundamental importance since it is the predicate for the effective exercise of all basic constitutional liberties. Moreover, this case involves the opportunity for higher education, which is of critical value in today's society. See *Vlandis* v. *Kline,* — U.S. —, 93 S.Ct. 2230, 2240 (Mr. Justice White, concurring).

The Act here creates an education program designed to restore lost educational opportunities particularly at the college and professional school level. The vital importance of this program to the individuals involved and to our society was emphasized from every quarter in Congress, see, e.g., S. Hear., *supra* at p. 103-104; S. Rep. 269, at 4-5.

Second, alternative service is the sole means by which I-O conscientious objectors can lawfully exercise their religious beliefs. In thus providing an avenue for the exercise of constitutional rights, the state is subject to heightened scrutiny to ensure that it has not attached unnecessary or oppressive conditions. Thus, in *James* v. *Strange, supra,* the Court condemned "harsh conditions" imposed on those

who exercise a constitutional right by the means prescribed by the state. See also *Boddie* v. *Connecticut*, 401 U.S. 371.

Third, Mr. Justice Powell for the majority in *Rodriguez* and Mr. Justice White concurring in *Vlandis* v. *Kline*, *supra* underscored as a significant factor, the extent of the differential in availability of the benefit. In *Rodriguez*, the Court stressed the "relative nature of the deprivation and the impossibility of ever achieving absolute equality in school financing or in the quality of education available to each student. In *Vlandis*, Mr. Justice White placed emphasis on the substantial difference between in-state and out-of-state tuition obligations.

Here, the deprivation is absolute and unqualified. All draftees, as the Government acknowledges, suffer disruption of their educational careers to the same degree; they all lose two years to those who are not drafted and do not serve. Congress created the education program solely because the loss of educational opportunities resulting from service would otherwise be irrevocable. The purpose of the Act is to restore these lost educational opportunities. All persons who serve in the military — regardless of the nature of their service — are enabled to regain the educational time they have lost. Only I-O conscientious objectors drafted for alternative service must sacrifice this time, not relatively, not substantially, but absolutely.

And their sacrifice is greatly magnified by the fact that their service puts them two years behind those who do not serve and two years behind all those who do serve. They are therefore singled out and made the base for everyone else's advantage.

Fourth, the punitive nature of the challenged classification is a factor that significantly raises this case to a still higher level on the spectrum. See *James* v. *Strange*, *supra*; *Lindsey* v. *Normet*, *supra*; *Eisenstadt* v. *Baird*, *supra*.

There is unmistakable evidence of the classification's retributory character: its effect as a flat tax on the exercise of religious freedom, that the tax is paid in terms of the conscientious objector's future and his and his family's welfare, that no other lawful means are available for the exercise of the religious beliefs involved here than the means provided and so severely taxed by the Government, and that the classification is part of a pattern of legislation that stems from the non-compensation policy — a policy engendered by hatred or by the fear of political retribution from a resentful public.

Fifth, the exclusive target of the challenged classification is the class of I-O conscientious objectors, which has been marked for legislative maltreatment in crisis periods throughout our history, when they have been politically powerless to protect their rights and interests.

d. The Challenged Classification Serves No Compelling or, Indeed, Any Other State Interest, and the Classification's Gross Imprecision Violates the Least Drastic Means Test

The Government appears to concede that the challenged classification cannot survive strict judicial scrutiny. It makes no attempt to show that the wholesale and absolute exclusion of alternative servicemen is justified either by a compelling state interest, or under the least drastic means test.

Moreover, aside from its failure to state a compelling interest, the Government offers no affirmative reason whatsoever for the Act's discriminatory and harsh treatment of a class of men who have been drafted and who have served their country honorably. By contrast, the Government argued below that the challenged exclusion affirmatively served to prevent fraudulent claims for conscientious

objector status. Having abandoned that affirmative, albeit unsupportable, rationale, the Government rests its case entirely on a negative, unsubstantiated hypothesis. That hypothesis is premised on what is characterized as the "total disruptive impact of military service"—a vague and uncertain "special impact," which is not based on real disruption or on wartime, combat zone, or actually hazardous service and which the Government concedes has no bearing on educational disruption. The hypothesis ignores the fact that express Government policy mandates comparable disruption of the alternative serviceman's civilian life; it merely assumes that in some unexplained way "total" disruption is different. On the basis of this unexplained differentiation the Government concludes that "total" disruption could therefore have been the purpose for the Act's education program rather than the purpose of compensating for educational disruption, which the Act expressly denominates as its purpose. The "total" disruption argument fails for the reason stated.

The Government's argument leaves it in the position of having to confront the fact that assistance is provided to large numbers of military personnel who suffer the same disruption of their civilian lives as do alternative servicemen and of having to rely on the "mathematical nicety" argument to override the inequities worked by the challenged classification. As we have demonstrated, the "mathematical nicety" rule cannot properly be applied to this case. But, even assuming *arguendo* that it is applicable here under the rational basis test, the rule has no force at the level of strict judicial scrutiny, where the Government is required to use the least drastic means to achieve its ends. That the unqualified, absolute exclusion of alternative servicemen from educational assistance does not satisfy this requirement is manifestly clear. Certainly,

more even treatment for I-O conscientious objectors would not thwart the Act's high purpose of restoring lost educational opportunities, nor need its purposes be served by "blight[ing] in such discriminatory fashion the hopes of" these men. *James* v. *Strange*, 407 U.S. at 141. This statute, as the Court in *James* said, "embodies elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." *Id.* at 142.

II.

The Absolute Denial of Educational Assistance Imposes an Unjustifiable Burden and Penalty on the Free Exercise of Religion by I-O Conscientious Objectors

The Free Exercise Clause, as this Court emphasized in *Sherbert* v. *Verner*, 374 U.S. 398, 402, forbids the Government from taking actions that "penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities . . ." The punitive character of the absolute exclusion from educational assistance is clear, as we have demonstrated. No reason is, or can be offered by the Government for exacting this forfeiture against persons who exercise their religious beliefs in the manner prescribed by the Government. The penalty is imposed in the form of a tax levy against the alternative serviceman's educational and career future. Cf. *Murdock* v. *Pennsylvania*, 319 U.S. 105.

The Government argues that the denial of educational assistance is not a penalty for, but merely an "indirect burden" on the religious freedom of I-O conscientious objectors. This conclusion is supported solely by reference to *Gillette* v. *United States*, *supra* at 462. But, in contrast to *Gillette*, this case does not involve any program of general applicability like conscription laws, that operates

on the neutral basis of "procuring the manpower necessary for military purposes . . ." 401 U.S. at 462. The provision in question here, is the part of the Act that excludes I-O conscientious objectors from receiving educational assistance. The challenged classification is a product of the non-compensation policy, which is entirely different, in its history and objectives, from the policy behind the conscription laws. Beyond *Gillette*, the Government offers nothing to explain the absolute denial of educational assistance for the educational disruption it acknowledges that all draftees suffer, alternative and military servicemen alike.

The Free Exercise Clause is nonetheless violated by the denial of educational assistance, even if the impact of such a denial can be reduced to an "indirect burden on religion," as the Government would have it. Indeed, this case is indistinguishable from *Sherbert* v. *Verner*, 374 U.S. 398, 403, where the Court condemned "any incidental burden on the free exercise of . . . religion" not supported by a compelling state interest. *Sherbert* was applied in *Gillette*, where the Court stated that "even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." 401 U.S. at 462. Such a burden can be justified only, as both *Gillette* and *Sherbert* make clear, by a compelling governmental interest in the regulation and then, only if the government could not "accomplish its purpose by means which do not impose such a burden." See *Braunfeld* v. *Brown*, 366 U.S. 599, 607; *Gillette* v. *United States*, *supra* at 462; *Sherbert* v. *Verner*, *supra* at 403, 406-409.

The Government makes no attempt to distinguish *Sherbert*, but asserts instead that this case is governed by

Gillette v. *United States, supra.* According to the Government, *Gillette* holds that an "indirect burden," such as that placed upon the religious freedom of I-O conscientious objectors, is not cognizable under the Free Exercise Clause. This is a patent misreading of *Gillette. Gillette* sustained Congress' refusal to recognize selective conscientious objection solely because it served precisely a compelling state interest. The Court in *Gillette* relies directly on *Sherbert* as authority for the controlling principles, and then expressly finds that the "incidental burdens" on the religious beliefs involved, "are strictly justified by substantial governmental interests that relate directly to the impacts questioned." 401 U.S. at 462. The Court based this conclusion on the finding that "a program of excusing objectors to particular wars may be 'impossible to conduct with any hope of reaching fair and consistent results'. . . ." *Id.* at 456. Of course that is not the case here, as the Government concedes, since inclusion of alternative servicemen in the Act's education program would in no conceivable way impair that program. In addition, the Government claims no compelling interest of any kind to justify the present exclusion.

The Government argues that denial of educational assistance is not coercive enough to force objectors to forego their religious precepts. The "burden" here, according to the Government, is therefore less than the "burden" in *Gillette.* But, even if that were true, the burden on religion in this case is of sufficient weight to require the Government to show a compelling reason for its existence. The loss of thousands of dollars of educational assistance, and the two years of educational opportunities that this money can buy back, precisely as the Act intends, is certainly as great a price to pay for adherence to religious beliefs as that paid by those who lost unemployment compensation

for adhering to their beliefs against Saturday work. See *Sherbert* v. *Verner, supra.*[53]

The safeguards erected by the First Amendment against governmental incursions on the Free Exercise of religion are not dependent on the degree to which an individual is tempted to forego his or her religious beliefs for temporal benefits or respite from temporal penalties.

The Government's argument that "coercive effects" cannot be shown here and therefore no Free Exercise question exists leads to an anomalous rule. Under this rule First Amendment protection would be available only to the spiritually weak, those who are tempted to forego their religious precepts. Those whose religious commitment is unwavering are protected not at all.

Nothing in this Court's opinions supports the Government's position or the rule that logically follows from it. There is no suggestion in *Sherbert* that the Seventh-Day Adventist indicated the slightest inclination to accept Satur-

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[53] We disagree with the assessment of the "burden" in this case by the court below. The court distinguished this case from *Sherbert* because the deprivations imposed by the Act are experienced long after the decision is made to apply for I-O conscientious objector status, and from *Braunfeld* and *Sherbert*, because of the lack of "positive economic injury." (23a). The coercive effect is just as strong here as in *Sherbert* since the registrant knows that he will lose educational assistance at the time he files for conscientious objector status. The positive economic injury resulting from two uncompensated years in service was documented by Congress, and indeed these facts of economic deprivation were the compelling force behind passage of the education program. Moreover, by contrast to *Sherbert* and *Braunfeld*, conscientious objectors have no other lawful alternative by which to exercise their religious beliefs to avoid or minimize the burdens resulting from the denial of educational assistance. Compare *Braunfeld* v. *Brown, supra*, at 605-606. *Sherbert* v. *Verner, supra*, at 399, n. 2. The only option available is a felony conviction with its attendant civil rights disabilities and the brutal life of prison.

day work in order to gain benefits. In fact, the record in *Sherbert* indicates that neither she, nor any of the 150 or more members of her faith who faced similar problems in Spartanburg, South Carolina, submitted to Saturday work. And in *Gillette*, the Court expressly recognized that Congress' action would have no impact on the objector's adherence to his religious faith, since the "sincere conscientious objector . . . feels himself bound in conscience not to compromise his beliefs or affiliations," but notwithstanding this, required the Government to show a compelling interest to justify the "incidental burden" felt by such registrants. 401 U.S. at 454, 462.

It is the nature of sincere conscientious objection that its moral force is preeminent over all other wordly considerations. As Chief Justice Hughes stated:

> . . . in the forum of conscience, duty to a moral power higher than the State has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.

United States v. *Macintosh*, *supra* at 633-634. It is somewhat demeaning to these beliefs to suggest, as the Government does, that they must be susceptible of compromise before they will be protected. There is no "burden" on the religious freedom of conscientious objectors in the sense that the Government uses the term, there is only a penalty.

It is the "burden" on the values protected by the First Amendment that calls forth the protection of the Free Exercise Clause. In essence, it is the very action by the State of requiring a citizen to make the choice—even though the outcome is inevitable—that offends the Constitution.

III.

The Federal Courts have Subject-Matter Jurisdiction Over this Case

The Government's final position is that even if the exclusion of alternative servicemen from the Act's educational program violates the First and Fifth Amendments, the federal courts, including this Court, lack subject-matter jurisdiction to grant any relief. The Government makes two arguments: first, that the bar raised by 28 U.S.C. § 211(a) against judicial review of legal or factual questions decided by the Administrator be extended to preclude review of a constitutional challenge to the Act itself, a question which the Administrator has not decided and expressly disclaims jurisdiction to decide; and second, that there is not statutory basis for jurisdiction in this case.

A. *This Court and the District Court have Subject-Matter Jurisdiction, Notwithstanding 38 U.S.C. § 211(a), to Decide the Act's Constitutionality*

The Government's argument strains the language and ignores the Administrator's own unreviewable interpretation of § 211(a). It ascribes to Congress an intention to wholly insulate its enactments from judicial review as to their constitutionality, an intention that has no precedent in our history. "Congress so far has never tried to destroy the Constitution." Hart and Wechsler, *The Federal Courts and the Federal System*, 331 (2nd ed. 1973).

The Government's reckless reading of § 211(a) is unsupportable on its face. But this Court has mandated especially strict rules of statutory interpretation for such a case as this. Accordingly, the availability of judicial review is presumptively established unless the Government satisfies its heavy burden by "a showing of 'clear and

convincing evidence' of a contrary legislative intent." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141; see *Barlow* v. *Collins*, 397 U.S. 159, 165-167; *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410. Steadfast adherence to this principle of statutory interpretation is absolutely necessary if the Court is to avoid a premature or needless clash with Congress on the question that goes to the very heart of our Constitutional system. Cf. *Kent* v. *Dulles*, 357 U.S. 116, 128-130.

The terms and purpose of § 211(a) plainly do not support the Government's position. Rather it is clear that Congress did not intend to preclude a constitutional challenge to the Act.

Section 211(a) specifies, in pertinent part, that "decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration . . . shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."

First, the constitutional question presented in this case was not and could not be decided by the Administrator.[54] Consequently, this is not a case seeking to review a "decision of the Administrator on any question of law or fact." The Administrator expressly disclaims jurisdiction to decide the constitutionality of the Act he is charged to administer.[55] Rather, the only decision that is being re-

[54] The Board of Veterans Appeals in Appeal of Peter W. Sly, C-27 593 725, May 10, 1972, on a claim for educational assistance by a I-O conscientious objector ruled that "[T]his decision does not reach the issue of the constitutionality of the pertinent laws as this matter is not within the jurisdiction of this Board."

[55] This comports of course with general principles of due process limiting the breadth of administrative power. See *McKart* v. *United States*, 395 U.S. 185; *California Comm'n* v. *United States*, 355 U.S. 534, 539.

viewed is that of Congress to exclude I-O conscientious objectors from the education program. That decision appears on the face of the Act and does not involve or depend in any degree upon administrative policy or implementation. Since the question of law has not been decided by the Administrator, its review by the federal courts is not precluded.

Second, the constitutional challenge does not arise under, nor is it determinable under, any law administered by the Veterans' Administration. Quite clearly, the operative law here is the Constitution, particularly the First and Fifth Amendments. The Administrator recognized this when he disclaimed jurisdiction over the matter. No question of statutory interpretation is presented and no question of the application of a benefits statute to any set of facts or particular case is presented. This case turns simply and solely on the application of certain constitutional provisions to the statute.

The Government eschews the terms of the Act and instead relies on a cryptic phrase, "all determinations," taken from the House Report (H. Rep. 91-1166, 91st Cong., 2nd Sess. (1970)) on the 1970 amendment to the Act. In context, that phrase relates solely to the amendment's purpose of foreclosing review of all types of decisions by the Administrator, those made on termination of benefits as well as those made on application for benefits. Congress sought to overrule an interpretation by the Court of Appeals for the District of Columbia of the previous version of § 211(a), to the effect that fact and law decisions on a benefit termination were reviewable. The cases involved, see Gov. Br. p. 22, n. 20, concerned Veterans' Administration policy and application of policy, not constitutional questions of any kind. Section 211(a) does not use the phrase "all determinations"; it speaks plainly of "decisions [by the Ad-

ministrator] on any question of law or fact." The Government would fundamentally amend the provision so that it foreclosed review of all questions whether or not decided by the Administrator. The Government's procedure would assuredly violate due process since educational assistance would be denied without consideration by either agency or court of a constitutional question of law. See *United States Department of Agriculture* v. *Murray*, — U.S. —, 93 S. Ct. 2832; *Vlandis* v. *Kline*, 93 S. Ct. 2230; *Boddie* v. *Connecticut*, 401 U.S. 371.

The very fact that the Government's procedure would settle questions without a hearing before the agency, an inferior federal court, a state court, or this Court, makes it abundantly clear that no such unprecedented procedure was intended by Congress. Cf. *Yakus* v. *United States*, 321 U.S. 414. The total absence of a forum is wholly unprecedented, and it should take far more than citation of a phrase out of context to establish Congress' intention to effect such a result.

The Government acknowledges that § 211(a) was designed to preclude the "flood" of cases involving particular agency policies and their applications to particular fact settings. But it speculates that with all the constitutional questions being raised these days, it is "appropriate to interpret Section 211(a) so as to avoid burdening the courts with *all* suits challenging the Administrator's decisions." (Gov. Br. p. 24). This is a totally frivolous suggestion that mocks the diligent and serious efforts of members of this and other courts and of the bar to find solutions for overloaded court dockets. It is hardly a meaningful addition to these efforts for the Government to propose, as it has here, that legal questions be settled by no one. Moreover, if the federal courts are here for any reason, they are here to determine questions of constitutional law, which have pro-

found national importance. To eliminate review of the constitutionality of Congressional enactments is to eliminate the very purpose of the federal judiciary. See *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 178. Such a result should not readily be attributed to Congress.[56]

B. *Section 211(a) Violates Article III of and the Fifth Amendment to the Constitution to the Extent that it Precludes Judicial Review of an Act of Congress*

It is inconceivable that § 211(a) could stand as a bar to review of the Act if it directed exclusion of veterans from the education program because of their race, religion, or political affiliation or simply at random. The Government's position is that it is not only conceivable, but Congress' intention.

The Government argues that it violates neither Article III nor the Fifth Amendment for Congress to withdraw jurisdiction where administrative action involves "no assertion of power over an individual, either to compel his compliance with a duty or to deprive him of liberty or property." Gov. Br. p. 10 in *Hernandez* v. *Veterans Administration*. Under this principle, the Government concludes that § 211(a) bars review here. But what is the right

[56] Contrary to the Government's contention, no court has sustained § 211(a) as a bar to reviewing a challenge to Acts of Congress. *Hoffmaster* v. *Veterans Administration*, 444 F. 2d 192 (3rd Cir. 1972) considers on the merits a challenge to the $10 attorney fee limitation imposed by 38 U.S.C. § 3404. The Third Circuit invoked § 211(a) only on a claim by the plaintiff that he was entitled to have the factual basis for his entitlement to benefits tried by a federal jury. The Ninth Circuit's decision in *Hernandez* v. *Administration*, 467 F. 2d 479 (1972) concludes, as the Government itself acknowledges, that a complete preclusion of judicial review on constitutional questions is unacceptable. See Brief for the Respondents in *Hernandez* v. *Veterans Administration*, *supra* at 18.

of conscientious objectors to free exercise of religion, if not liberty? And what is the right to equal treatment under the law, if not liberty? The questions raised in this case center on whether I-O conscientious objectors can constitutionally be deprived of these liberties.

In *St. Joseph Stock Yards Co.* v. *United States,* 298 U.S. 38, 52, Chief Justice Hughes stated: "Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by a legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority." The Government contends that the I-O conscientious objectors in this case are not entitled to the same judicial protections because that case involved "a large capital investment" claimed to be threatened with confiscation. The Government finds no worth in two years of educational opportunities that the Government is claimed to be taking arbitarily from alternative servicemen. The Government position attempts to resurrect the right/privilege distinction, which this Court has thoroughly repudiated. See e.g., *Sherbert* v. *Verner, supra* at 404; cf. *Lynch* v. *Household Finance Corp.* 405 U.S. 538, 552. These decisions make clear that the availability of benefits cannot be conditioned on an applicant's forfeiture of constitutional rights. But, it certainly is an infinitely greater impairment of constitutional liberties for Congress not only to refuse the benefits, but also to bar the Courts from granting relief from this unlawful action.

The Government relies on *Lynch* v. *United States,* 292 U.S. 571. Gov. Br. p. 25. But, the broad language quoted pertains to sovereign immunity, an issue not involved in this case. And the Government admits that the language is *dictum.* Moreover, while it may be true that when Congress creates rights it is not obligated to provide a remedy, here, the rights asserted are those established by the Con-

stitution. Finally, it should be noted that *Lynch* v. *United States, supra* actually limits the scope of sovereign immunity where "constitutional rights are at stake." Hart and Wechsler, *supra*, at 336.[57]

The Government seeks support in the proposition that Congress can grant or withhold federal jurisdiction as it sees fit. (Gov. Br. p. 10-11, *Hernandez* v. *Veterans Administration*). Whatever the validity of that argument, it has no bearing in this case. Here Congress has withdrawn jurisdiction from all possible forums—inferior federal courts, this Court, the agency and the state courts. While Congress can apportion some aspects of federal question jurisdiction among these forums, it cannot withdraw it from all. See *Palmore* v. *United States*, — U.S. —, 93 S. Ct. 1670. "Congress' power to draw exceptions to this Court's jurisdiction must be circumscribed at the point where its exercise will destroy the essential role of the Supreme Court in the constitutional plan." Hart and Wechsler, *supra*, at 331. And *Palmore* clearly predicates its recognition of Congress' power over original federal question jurisdiction on the assumption that where it is appropriately withheld from inferior federal courts it will be lodged with the state judiciaries. Cf. *Testa* v. *Kalt*, 330 U.S. 386.

Finally, as the Court also made clear in *Palmore*, there is a core of federal question jurisdiction that may not be alienated from the federal courts. That jurisdiction, pre-

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[57] *Lynch* does refer to a predecessor to § 211(a), but passes no judgment on it. See 292 U.S. at 587.

De Rudalfa v. *United States*, 461 F. 2d 1240 (D.C. Cir. 1972), also relied on by the Government (Gov. Br. p. 26 n. 23), in fact indicates that if the veteran had presented a constitutional question, the court would have decided it notwithstanding § 211(a). See *id.* at 1256.

The commentators relied on by the Government (Gov. Br. p. 27), do not in fact support its position, since none of the commentories cited considered the problem of Congress' withdrawing jurisdiction to review the constitutionality of its enactments.

served for federal forums by Article III, relates to "laws of national applicability and affairs of national concern . . ." 93 S. Ct. at 1681, or, as Randolph expressed it during the Constitutional Convention, "questions which involve the national peace and harmony." See Hart and Wechsler, *supra* at 12-13. It is significant that while general federal question jurisdiction was not granted to the federal courts until 1875, Congress had previously lodged the necessary jurisdiction to cover the national-oriented federal questions with the federal court. Thus in the Judiciary Act of 1789, 1 Stat. 72, Congress granted mandamus jurisdiction to the Supreme Court. Although the Court found that jurisdiction adequate to determine the power of the President to refuse a commission, a question certainly affecting the national peace and harmony, the Court concluded that Article III prohibited it from receiving a grant of original jurisdiction not within the categories specified by the Article. *Marbury* v. *Madison, supra.* However, directly following that decision, Congress lodged original mandamus jurisdiction with the District Court of the District of Columbia. See *Kendall* v. *United States,* 12 Pet. 524. Therefore there has always been a federal judicial check on the power exercised by federal officials in every period of our history, 28 U.S.C. § 1361, providing strong corroborative evidence that the Constitution mandates at least that much jurisdiction for the federal courts. Since this is a case of national laws and national affairs, it comes within the ambit of Article III's mandated jurisdiction.

C. *This Action Rests on Ample Statutory Jurisdictional Bases.*

1. This action is authorized by 28 U.S.C. § 1361. While this section establishes jurisdiction for an action "in the nature of mandamus," it does not limit the relief that a

district court can grant. The Mandamus Act was designed to broaden the availability of jurisdiction to review the actions of federal officials. Clearly, in many of those cases the coercive and abrasive remedy of mandamus would be inappropriate. In such cases, where declaratory relief would be adequate, it must be assumed that Congress intended that a court grant that milder form of relief. Neither the Mandamus Act nor the Declaratory Judgment Act, 28 U.S.C. § 2201, is by its terms exclusive of the other.

Indeed, 28 U.S.C. § 2201 conditions the availability of declaratory relief solely on the existence of a "case of actual controversy within its [the district court's] jurisdiction." The section expressly notes that such relief can be granted "whether or not further relief is or could be sought." And as this Court stated, "[a] court may grant declaratory relief even though it chooses not to issue an injunction or mandamus." *Powell* v. *McCormack*, 395 U.S. 486, 499, see also at 517-519; see also *Burnett* v. *Tolson*, 474 F. 2d 877, 883 (4th Cir. 1973).

2. This action is also properly based on 28 U.S.C. § 1331. Although the maximum amount of educational assistance available is less than $10,000, more was at stake when the case was filed and acted upon by the district court. Robison instituted this action at a time when it appeared that he would be required to leave law school at the end of his first year to work full-time, perhaps for a year, in order to earn sufficient funds to continue his education. When Robison was discharged from alternative service he did not have enough money to go directly to law school making it necessary for him to work a good part of the year preceeding his enrollment at Northeastern Law School. Robison's financial circumstances at the time this suit was instituted are specified in the complaint:

> Plaintiff's financial situation is such that without educational assistance from the Veterans' Administra-

> tion, he will be unable to afford his law school tuition, which is $2400 per year, and may be forced to leave law school next year to obtain sufficient funds to complete his education.

The loss of at least a year of professional work and experience far exceeds $10,000. Although Robison, through diligent efforts including part-time work of 20-30 hours per week during law school and several state loans at considerable interest, has been able to avoid interrupting his education, these intervening events do not negate the jurisdiction established under § 1331. Jurisdictional amount requirements are met at the commencement of the suit when the plaintiff states in good faith that the controversy involves an amount greater than $10,000. That was surely the case here. But, as is clear from the terms of § 1331 itself, failure at later stages to establish entitlement of $10,000 does not revert back to destroy the court's jurisdiction. Cf. *Smith* v. *Sperling*, 354 U.S. 91; *Louisville, N. A. & C. Ry. Co.* v. *Louisville Trust Co.*, 174 U.S. 522.[58]

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[58] There are additional facts and theories for establishing the necessary jurisdictional amount, and if no other basis for jurisdiction is sustained, the Court may remand the case following determination of the other issues herein, for a proceeding to establish jurisdictional amount. See *Oestereich* v. *Selective Service Board*, 393 U.S. 233, 239.

Conclusion.

For the reasons stated herein and by the district court, the judgment should be affirmed.

Respectfully submitted,

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